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UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
BALLSTON BUILDING NO. 3, 4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

INDEX-DIGEST  
JANUARY-DECEMBER 1991

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## UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior ----- Manual Lujan, Jr.  
Office of Hearings and Appeals -Roger E. Middleton  
Office of the Solicitor ----- Thomas L. Sansonetti

## INDEX-DIGEST

JANUARY - DECEMBER 1991

This index-digest covers all published and unpublished decisions and opinions, by their headnotes and legal cites, of the Department of the Interior from January 1, 1991 - December 31, 1991, rendered in the Office of Hearings and Appeals (OHA), Arlington, VA, and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

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## TABLE OF CONTENTS

Topical Index .....	iii
Acronyms .....	xv
Key to Previous/Current Volumes .....	xv
Table of Decisions .....	xvii
Opinions of the Solicitor .....	xxxiii
Table of Overruled and Modified Cases for the Department of the Interior .....	xxxv
Table of Statutes Cited:	
(A) United States Statutes .....	lv
(B) Revised Statutes .....	lxiii
(C) United States Codes .....	lxv
Index-Digest .....	1

TOPICAL INDEX TO DECISIONS AND OPINIONS  
OF THE DEPARTMENT OF THE INTERIOR

ACCOUNTS	
FEES AND COMMISSIONS .....	1
REFUNDS .....	1
ACCRETION .....	1-2
ACT OF JUNE 25, 1910 .....	2
ACT OF JULY 17, 1914 .....	2
ACT OF MARCH 20, 1922 .....	2-3
ACT OF SEPTEMBER 1, 1937 .....	3
ACT OF AUGUST 24, 1954 .....	3-4
ACT OF OCTOBER 18, 1974 .....	4
ADMINISTRATIVE AUTHORITY	
GENERALLY .....	4-6
ESTOPPEL .....	6-8
ADMINISTRATIVE PRACTICE .....	8
ADMINISTRATIVE PROCEDURE	
GENERALLY .....	8-10
ADJUDICATION .....	10-12
ADMINISTRATIVE LAW JUDGES .....	13
ADMINISTRATIVE PROCEDURE ACT .....	13
ADMINISTRATIVE RECORD .....	14-15
ADMINISTRATIVE REVIEW .....	15-18
BURDEN OF PROOF .....	18-21
HEARINGS .....	21-23
JUDICIAL REVIEW .....	23-24
STANDING .....	24-26
ALASKA	
NATIVE ALLOTMENTS .....	26-33
STATEHOOD ACT .....	34
TOWNSITES .....	34-35
ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT	
DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE	
ALLOTMENT APPLICANTS .....	35-36
NATIVE ALLOTMENTS .....	36-39
STATE SELECTIONS .....	40
VALID EXISTING RIGHTS .....	40
ALASKA NATIVE CLAIMS SETTLEMENT ACT	
GENERALLY .....	40-41
ADMINISTRATIVE PROCEDURE	
Decision to Issue Conveyance .....	41
APPEALS	
Standing .....	42
CONVEYANCES	
Easements .....	42-43
Reconveyances .....	43
EASEMENTS	
Access .....	43-44
Decision to Reserve .....	44
NATIVE LAND SELECTIONS	
Village Selections .....	45

APPEALS	
GENERALLY .....	45-51
JURISDICTION .....	51-52
APPLICATIONS AND ENTRIES	
GENERALLY .....	53
RELINQUISHMENT .....	53-54
APPRAISALS .....	54-60
ATTORNEYS .....	61
BOARD OF INDIAN APPEALS	
GENERALLY .....	61
JURISDICTION .....	62-69
BOARD OF LAND APPEALS .....	69-72
BUREAU OF INDIAN AFFAIRS	
GENERALLY .....	72-73
ADMINISTRATIVE APPEALS	
Generally .....	73-76
Acts of Agents of the United States .....	76
Discretionary Decisions .....	76-77
Filing	
Mandatory Time Limit .....	77
Leases .....	78
BUREAU OF LAND MANAGEMENT .....	78-79
CLAIMS BY THE UNITED STATES .....	79
COAL LEASES AND PERMITS	
GENERALLY .....	80
APPLICATIONS .....	80-81
DILIGENCE .....	81
LEASES .....	81-82
READJUSTMENT .....	82-83
RELINQUISHMENT .....	84
RENTALS .....	84-85
ROYALTIES .....	85-87
TERMINATION .....	87-88
COLOR OR CLAIM OF TITLE	
GENERALLY .....	88
APPLICATIONS .....	89
DESCRIPTION OF LAND .....	89-90
GOOD FAITH .....	90
COMMUNICATION SITES .....	90-92
CONSTITUTIONAL LAW	
DUE PROCESS .....	93
CONTESTS AND PROTESTS	
GENERALLY .....	93-95
GOVERNMENT CONTESTS .....	95
CONTRACT DISPUTES ACT OF 1978	
GENERALLY .....	96
ATTORNEY FEES	
Allowable Expenses .....	96-97
Application and Jurisdiction .....	98
Substantially Justified .....	98

## CONTRACTS

GENERALLY .....	99
CONSTRUCTION AND OPERATION	
Generally .....	99-100
Actions of Parties .....	100-102
Assignment of Claims .....	102-103
Changes and Extras .....	103-105
Contract Clauses .....	105-106
Contracting Officer .....	106
Differing Site Conditions (Changed Conditions) .....	106-107
Drawing and Specifications .....	107-109
Duty to Inquire .....	109-110
Estimated Quantities .....	110-111
General Rules of Construction .....	112
Intent of Parties .....	112
Labor Laws .....	113
Third Persons .....	113
CONTRACT DISPUTES ACT OF 1978	
Jurisdiction .....	113-118
DISPUTES AND REMEDIES	
Burden of Proof .....	119-120
Damages	
Generally .....	120-121
Measurement .....	121
Equitable Adjustments .....	121-122
Extraordinary Remedies .....	122
Jurisdiction .....	123-126
Substantial Evidence .....	126
Termination for Default	
Generally .....	127
FEDERAL PROCUREMENT REGULATIONS .....	127
FORMATION AND VALIDITY	
Formalities .....	128
Mistakes .....	128-129
INDIAN SELF-DETERMINATION AND EDUCATION	
ASSISTANCE ACT	
Generally .....	129
PERFORMANCE OR DEFAULT	
Generally .....	120
Compensable Delays .....	130
RULES OF PRACTICE	
Motions .....	130
CONVEYANCES	
INTEREST CONVEYED .....	131-132
RESERVATIONS .....	132
RESERVATIONS AND EXCEPTIONS .....	133
COURTS .....	133
DELEGATION OF AUTHORITY .....	133

DESERT LAND ENTRY	
CANCELLATION .....	134
EXTENSION OF TIME .....	134
FINAL PROOF .....	134-135
WATER RIGHT .....	135
WATER SUPPLY .....	135
ENDANGERED SPECIES ACT OF 1973	
SECTION 7	
Generally .....	136
Consultation .....	136
Mitigation .....	136-137
ENVIRONMENTAL POLICY ACT .....	137-140
ENVIRONMENTAL QUALITY	
ENVIRONMENTAL STATEMENTS .....	140-144
EQUAL ACCESS TO JUSTICE ACT	
ADVERSARY ADJUDICATION .....	144
APPLICATION .....	144-145
CONTRACT DISPUTES ACT OF 1978	
Allowable Expenses .....	145-146
Application and Jurisdiction .....	146
Substantially Justified .....	147
ESTOPPEL .....	147-148
EVIDENCE	
GENERALLY .....	149
BURDEN OF PROOF .....	149-151
HEARSAY .....	151
PREPONDERANCE .....	151
PRESUMPTIONS .....	152
STIPULATIONS .....	152
SUFFICIENCY .....	152-153
EXCHANGES OF LAND	
GENERALLY .....	153-155
FOREST EXCHANGES .....	155
FEDERAL EMPLOYEES AND OFFICERS	
AUTHORITY TO BIND GOVERNMENT .....	155-156
FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976	
GENERALLY .....	156-157
ASSESSMENT WORK .....	157-158
CONVEYANCES .....	158-159
EXCHANGES .....	159-160
GRAZING LEASES AND PERMITS .....	160
LAND-USE PLANNING .....	161
LEASES .....	161-162
MINERAL REVENUES .....	162
PERMITS .....	162-164
PLAN OF OPERATIONS .....	164
PUBLIC PARTICIPATION .....	164
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR	
NOTICE OF INTENTION TO HOLD MINING CLAIM .....	165-166
RECORDATION OF MINING CLAIM CERTIFICATES OR	
NOTICES OF LOCATION .....	166-167
RESERVATION AND CONVEYANCE OF MINERAL INTERESTS.	167

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (Cont.)	
RIGHTS-OF-WAY .....	168-173
RULES AND REGULATIONS .....	173
SALES .....	174-175
SURFACE MANAGEMENT .....	175
WILDERNESS .....	175-176
WITHDRAWALS .....	176
FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982	
ASSESSMENTS .....	177
CIVIL PENALTIES .....	177
ROYALTIES .....	178-180
FEES .....	180
GEOTHERMAL LEASES	
GENERALLY .....	181
ASSIGNMENTS OR TRANSFERS .....	181
LANDS SUBJECT TO .....	181
PATENTED OR ENTERED LANDS .....	182
RENTALS .....	182
GRAZING AND GRAZING LANDS .....	182-183
GRAZING LEASES	
GENERALLY .....	183
APPORTIONMENT OF LAND .....	184
CANCELLATION OR REDUCTION .....	184
PREFERENCE RIGHT APPLICANTS .....	184-185
GRAZING PERMITS AND LICENSES	
GENERALLY .....	185-186
ADMINISTRATIVE LAW JUDGE .....	186
APPEALS .....	187
CANCELLATION OR REDUCTION .....	188
HEARINGS .....	189-190
INDIAN PROBATE	
ADMINISTRATIVE LAW JUDGE	
Authority .....	290
APPEAL	
Generally .....	191
BUREAU OF INDIAN AFFAIRS	
Generally .....	191
HEARING	
Notice .....	192
INDIAN LAND CONSOLIDATION ACT	
Escheat .....	192
INVENTORY	
Property Erroneously Excluded or Included ....	193
NOTICE OF HEARING	
Generally .....	193-194
Renunciation .....	194
REOPENING	
Standing to Petition for Reopening .....	194
REPRESENTATION .....	195

## INDIAN PROBATE (Cont.)

## WILLS

## Testamentary Capacity

Generally ..... 195-196

Undue Influence ..... 196-197

## INDIANS

GENERALLY ..... 197-199

BLOOD QUANTUM ..... 199

## CONTRACTS

Generally ..... 199-201

## Formation and Validity

Generally ..... 201

Tribally Controlled Schools ..... 202

## FINANCIAL MATTERS

Financial Assistance ..... 202-209

Individual Indian Money Accounts ..... 209

## HOUSING

Housing Improvement Program ..... 209-210

INDIAN REORGANIZATION ACT ..... 210

## INDIAN SELF-DETERMINATION AND EDUCATION

## ASSISTANCE ACT

Generally ..... 211

## LANDS

Generally ..... 211

Aboriginal Title ..... 211-212

## Allotments

Generally ..... 212

## Allotments on Public Domain

Generally ..... 212

## Individual Trust or Restricted Land

Generally ..... 213

Alienation ..... 213

Rights-of-Way ..... 214-215

Tribal Lands ..... 215

Trust Acquisitions ..... 215-217

Trust Patent ..... 217-218

## LEASES AND PERMITS

Generally ..... 218-221

Amendments ..... 221

Arbitration ..... 222

Assignments ..... 222

Cancellation or Revocation ..... 223-224

Commercial Leases ..... 224

Farming and Grazing ..... 225

Subleases ..... 226

## Violation/Breach

Generally ..... 226

Damages ..... 227

## MINERALS RESOURCES

## Oil and Gas

Generally ..... 227-229

Communitization Agreements ..... 229

INDIANS (Cont.)	
RESERVATIONS	
Generally .....	230
TIMBER RESOURCES	
Generally .....	230
Timber Sales Contracts	
Generally .....	230-231
TRIBAL GOVERNMENT	
Generally .....	232
Constitutions, Bylaws, and Ordinances .....	232-233
Elections .....	233
Judicial System .....	233-234
TRUST RESPONSIBILITY .....	234
JUDICIAL REVIEW .....	235
LACHES .....	235
MIGRATORY BIRD CONSERVATION ACT	
GENERALLY .....	235
MILLSITES	
GENERALLY .....	236
DETERMINATION OF VALIDITY .....	236
MINERAL LANDS	
GENERALLY .....	237
DETERMINATION OF CHARACTER OF .....	238-239
MINERAL RESERVATION .....	239
MINERAL LEASING ACT	
GYPSUM LEASES AND PERMITS	
Workability .....	240
RENTALS .....	240
ROYALTIES .....	241-243
MINERALS MANAGEMENT SYSTEM	
GENERALLY .....	244
MINING CLAIMS	
GENERALLY .....	245-251
ABANDONMENT .....	251
ASSESSMENT WORK .....	251-253
COMMON VARIETY OF MINERALS	
Generally .....	253-258
Special Value .....	258-260
Unique Property .....	260-262
CONTESTS .....	262-267
DETERMINATION OF VALIDITY .....	268-276
DISCOVERY	
Generally .....	276-284
Geologic Inference .....	284-285
Marketability .....	285-288
ENVIRONMENT .....	289
EXCESS RESERVES .....	289
LANDS SUBJECT TO .....	290-291
LOCATABILITY OF MINERAL	
Generally .....	292-297
LOCATION .....	297-299
LODE CLAIMS .....	299

## MINING CLAIMS (Cont.)

MILLSITES .....	299
MINERAL LANDS .....	300
PATENT .....	300-301
PLACER CLAIMS .....	301-302
PLAN OF OPERATIONS .....	302
RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION .....	303
RELOCATION .....	304
SPECIFIC MINERAL(S) INVOLVED	
Pumice .....	304-305
SURFACE USES .....	305-306
TUNNEL SITES .....	306-307
WITHDRAWN LAND .....	307-309
NATIONAL ENVIRONMENTAL POLICY ACT OF 1969	
GENERALLY .....	309-310
ENVIRONMENTAL STATEMENTS .....	310-314
FINDING OF NO SIGNIFICANT IMPACT .....	314-317
NATIONAL HISTORIC PRESERVATION ACT	
GENERALLY .....	317
JURISDICTION OVER LANDS WITHIN .....	318
OIL AND GAS LEASES	
GENERALLY .....	318-319
ACQUIRED LANDS LEASES .....	319-320
APPLICATIONS	
Generally .....	320-321
Description .....	321-322
ASSIGNMENTS OR TRANSFERS .....	322-323
BONA FIDE PURCHASER .....	323
BONDS .....	323-324
CANCELLATION .....	324
CIVIL ASSESSMENTS AND PENALTIES .....	324-326
COMPENSATORY ROYALTY .....	326-327
COMPETITIVE LEASES .....	328
DESCRIPTION OF LAND .....	329
DISCOVERY .....	329
DRAINAGE .....	330-331
DRILLING .....	331-334
EXPIRATION .....	334
FUTURE AND FRACTIONAL INTEREST LEASES .....	334-336
INCIDENTS OF NONCOMPLIANCE .....	336-337
KNOWN GEOLOGIC STRUCTURE .....	337
LANDS SUBJECT TO .....	337
NONCOMPETITIVE LEASES .....	338
OFFERS TO LEASE .....	338
PRODUCTION .....	338
REINSTATEMENT .....	339-340
RENTALS .....	341
ROYALTIES	
Generally .....	341-345
Interest .....	345-346
Natural Gas Liquid Products .....	346-348
Payments .....	348-349

OIL AND GAS LEASES: ROYALTIES: (Cont.)	
Processing Allowance .....	349-350
STIPULATIONS .....	351
SUSPENSIONS .....	351-352
TERMINATION .....	352-353
UNIT AND COOPERATIVE AGREEMENTS .....	353-354
OIL SHALE	
GENERALLY .....	355
OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS	
BAY GRANT LANDS .....	355
OUTER CONTINENTAL SHELF LANDS ACT	
OIL AND GAS LEASES .....	355-358
REFUNDS .....	358
STATE LEASES	
Generally .....	358-359
PATENTS OF PUBLIC LANDS	
GENERALLY .....	359
EFFECT .....	359-360
RESERVATIONS .....	360-361
SUITS TO CANCEL .....	361-362
PAYMENTS	
GENERALLY .....	363
POWERSITE LANDS .....	363-364
PRACTICE BEFORE THE DEPARTMENT	
GENERALLY .....	364
PERSONS QUALIFIED TO PRACTICE .....	364
PRIVATE LAND CLAIMS	
GENERALLY .....	365
PUBLIC LANDS	
GENERALLY .....	365-366
ADMINISTRATION .....	366-367
CLASSIFICATION .....	367
DISPOSALS OF	
Generally .....	368-369
JUSTIFICATION OVER .....	369
LEASES AND PERMITS .....	369
RIPARIAN RIGHTS .....	370
SPECIAL USE PERMITS .....	370-372
PUBLIC SALES	
GENERALLY .....	372
SALES UNDER SPECIAL STATUTES .....	373
RAILROAD GRANT LANDS .....	374
RECREATION AND PUBLIC PURPOSES ACT .....	374-375
REGULATIONS	
GENERALLY .....	375-376
APPLICABILITY .....	377
BINDING ON THE SECRETARY .....	377
FORCE AND EFFECT AS LAW .....	377
INTERPRETATION .....	378
VALIDITY .....	378-379
RENT .....	379-380
RES JUDICATA .....	380-381

## RIGHTS-OF-WAY

GENERALLY .....	382-383
ACT OF JANUARY 21, 1895 .....	383
APPLICATIONS .....	383
APPRAISALS .....	384-388
CANCELLATION .....	388
CONDITIONS AND LIMITATIONS .....	388-389
FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 .	389-390
OIL AND GAS PIPELINES .....	390-391

## RULES OF PRACTICE

GENERALLY .....	391-393
-----------------	---------

## APPEALS

Generally .....	393-395
Board of Land Appeals .....	396
Burden of Proof .....	396-397
Dismissal .....	397-403
Effect of .....	403-404
Failure to Appeal .....	404
Hearings .....	405-406
Jurisdiction .....	406-409
Motions .....	409-412
Notice of Appeal .....	412
Protests .....	412-413
Standing to Appeal .....	413-419
Statement of Reasons .....	419-420
Timely Filing .....	420-422

EVIDENCE .....	422-423
----------------	---------

GOVERNMENT CONTESTS .....	423-424
---------------------------	---------

HEARINGS .....	425-426
----------------	---------

PROTESTS .....	426-427
----------------	---------

SUPERVISORY AUTHORITY OF THE SECRETARY .....	428
--	-----

SECRETARY OF THE INTERIOR .....	428
---------------------------------	-----

SEGREGATION .....	428-429
-------------------	---------

SPECIAL USE PERMITS .....	430-431
---------------------------	---------

STATE SELECTIONS .....	432
------------------------	-----

## STATUTORY CONSTRUCTION

ADMINISTRATIVE CONSTRUCTION .....	432
-----------------------------------	-----

INDIANS .....	432-433
---------------	---------

LEGISLATIVE HISTORY .....	433
---------------------------	-----

## SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

GENERALLY .....	433-434
-----------------	---------

## ADMINISTRATIVE PROCEDURE

Generally .....	434-436
-----------------	---------

Burden of Proof .....	436-437
-----------------------	---------

## APPLICABILITY

Generally .....	438
-----------------	-----

## APPROXIMATE ORIGINAL CONTOUR

Generally .....	439
-----------------	-----

## BACKFILLING AND GRADING REQUIREMENTS

Generally .....	439
-----------------	-----

## SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

(Cont.)

## BONDS

Generally .....	439-440
Release of .....	440

## CESSATION ORDERS

Generally .....	440-442
-----------------	---------

## CITIZEN COMPLAINTS

Generally .....	442-444
-----------------	---------

## CIVIL PENALTIES

Generally .....	444
-----------------	-----

## ENFORCEMENT PROCEDURES

Generally .....	445-446
-----------------	---------

## EVIDENCE

Generally .....	446-448
-----------------	---------

## EXEMPTIONS

2-Acre .....	448-449
--------------	---------

## FEDERAL PROGRAM

Permits .....	449-450
---------------	---------

## HEARINGS

Procedure .....	450
-----------------	-----

## IMPOUNDMENTS

Generally .....	450-451
-----------------	---------

## INSPECTIONS

Generally .....	451
-----------------	-----

10-day Notice to State .....	451-452
------------------------------	---------

## NOTICES OF VIOLATION

Generally .....	452-454
-----------------	---------

Permittees .....	455
------------------	-----

## PERFORMANCE BOND OR DEPOSIT

Generally .....	455-456
-----------------	---------

Release .....	456
---------------	-----

## PERMITS

Generally .....	456-458
-----------------	---------

Ownership or Control .....	458
----------------------------	-----

Revisions .....	458-459
-----------------	---------

## POSTMINING LAND USE

Generally .....	459
-----------------	-----

## PROHIBITION OF MINING OPERATIONS

Generally .....	460-462
-----------------	---------

## REVEGETATION

Generally .....	462
-----------------	-----

## SPOIL AND MINE WASTES

Generally .....	463
-----------------	-----

## STATE PROGRAM

Generally .....	463-464
-----------------	---------

10-day Notice to State .....	464-466
------------------------------	---------

## STATE REGULATION

Generally .....	466-467
-----------------	---------

## VALID EXISTING RIGHTS

Generally .....	467-469
-----------------	---------

WORDS AND PHRASES .....	469-470
-------------------------	---------

SURVEYS OF PUBLIC LANDS	
GENERALLY .....	470-472
OMITTED LANDS .....	472-473
TAYLOR GRAZING ACT .....	473
TIMBER SALES AND DISPOSALS .....	474
TOWNSITES .....	475
TRESPASS	
GENERALLY .....	476
MEASURE OF DAMAGES .....	477
UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY	
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)	
UNIFORM REAL PROPERTY ACQUISITION POLICY	
Generally .....	478
UNIFORM RELOCATION ASSISTANCE	
Moving and Related Expenses	
Generally .....	478-479
Replacement Housing Payment for Homeowners	
Generally .....	479-480
WILD FREE-ROAMING HORSES AND BURROS ACT .....	480-482
WILDERNESS ACT .....	482-483
WILDLIFE REFUGES AND PROJECTS	
ADMINISTRATION .....	484
WITHDRAWALS AND RESERVATIONS	
GENERALLY .....	484
AUTHORITY TO MAKE .....	485
EFFECT OF .....	485-486
RECLAMATION WITHDRAWALS .....	486
REVOCATION AND RESTORATION .....	487
WORDS AND PHRASES .....	487-488

SYMBOLS

AIRFA	----	American Indian Religious Freedom Act of 1978
ANCSA	----	Alaska Native Claims Settlement Act
ANCAB	----	Alaska Native Claims Appeal Board
ANILCA	----	Alaska National Interest Lands Conservation Act
APA	----	Administrative Procedure Act
BIA	----	Bureau of Indian Affairs
BLM	----	Bureau of Land Management
CFR	----	Code of Federal Regulations
EA	----	Environmental Assessment
EAJA	----	Equal Access to Justice Act
EIS	----	Environmental Impact Statement
EPA	----	Environmental Protection Agency
FLPMA	----	Federal Land Policy and Management Act of 1976
FONSI	----	Finding of No Significant Impact
(US) FS	----	United States Forest Service
IBCA	----	Interior Board of Contract Appeals
IBIA	----	Interior Board of Indian Appeals
IBLA	----	Interior Board of Land Appeals
IBMA	----	Interior Board of Mine Operations Appeals
IBSMA	----	Interior Board of Surface Mining and Reclamation Appeals
IMLA	----	Indian Mineral Leasing Act of 1938
IRA	----	Indian Reorganization Act
M	----	Solicitor's Opinion
MMS	----	Mineral Management Service
NPA	----	National Park Service
OHA	----	Office of Hearings and Appeals
OSM(RE)	----	Office of Surface Mining Reclamation and Enforcement
SEC	----	Office of the Secretary
SMCRA	----	Surface Mining Control and Reclamation Act of 1977
U.S.C.	----	United States Code

\* \* \* \* \*

KEY TO PREVIOUS/CURRENT VOLUMES

1965 - 1974

72 I.D. - 81 I.D.  
 1 IBCA 1 - 7 IBCA 178  
 1 IBIA 1 - 2 IBIA 326  
 1 IBLA 1 - 18 IBLA 249  
 2 IBMA 1 - 3 IBMA 533  
 1 OHA 1 - 1 OHA 74

KEY TO PREVIOUS VOLUMES (CONT.)

1975 - 1979

82 I.D. - 86 I.D.  
 1 ANCAB 1 - 4 ANCAB 110  
 7 IBCA 204 - 13 IBCA 80  
 3 IBIA 215 - 7 IBIA 299  
 18 IBLA 286 - 44 IBLA 318  
 4 IBMA 1 - 8 IBMA 255  
 1 IBSMA 1 - 1 IBSMA 325  
 1 OHA 78 - 3 OHA 161

1980 - 1984

87 I.D. - 91 I.D.  
 4 ANCAB 112 - 7 ANCAB 206  
 13 IBCA 105 - 20 IBCA 353  
 8 IBIA 1 - 13 IBIA 62  
 45 IBLA 1 - 84 IBLA 233  
 2 IBSMA 1 - 5 IBSMA 44  
 3 OHA 168 - 5 OHA 351

1985 - 1989

92 I.D. - 96 I.D.  
 21 IBCA 1 - 27 IBCA 166  
 13 IBIA 69 - 18 IBIA 98  
 84 IBLA 236 - 112 IBLA 254  
 6 OHA 1 - 8 OHA 129

1990

97 I.D.  
 27 IBCA 79 - 27 IBCA 301  
 18 IBIA 103 - 19 IBIA 123  
 112 IBLA 261 - 117 IBLA 230  
 8 OHA 134 - 8 OHA 237

1991

98 I.D.  
 27 IBCA 303 - 27 IBCA 535  
 19 IBIA 134 - 21 IBIA 133  
 117 IBLA 239 - 122 IBLA 6  
 9 OHA 8 - 9 OHA 108

## Table of Decisions Reported

Abbott, Kenneth F. v. Billings Area Director, BIA, 20 IBIA 268  
(Sept. 24, 1991) Pages 72, 219, 229

Alaska Power Administration, 119 IBLA 301 (June 11, 1991)  
Pages 45, 364, 488

Alaska, State of, 119 IBLA 260 (May 22, 1991) Pages 31, 38

Alaska, State of (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)  
Pages 24, 28, 46, 380, 413

Alaska, State of (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)  
Pages 26, 381, 403, 418

Alaska, State of (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19,  
1991) Pages 33, 39, 44, 95, 419, 427

Alaska, State of (Molly Tocktoo), 118 IBLA 1 (Feb. 13, 1991)  
Pages 29, 37, 94

Allen, G. H., et al., 119 IBLA 272 (May 30, 1991) Pages 80,  
415

Allen, Mitchell, 117 IBLA 330 (Jan. 24, 1991) Pages 27, 37,  
393

Aloe, John & Liberty Masonry, Inc., 117 IBLA 298 (Jan. 17,  
1991) Pages 69, 477

AMAX Magnesium, 119 IBLA 281 (June 6, 1991) Pages 56, 169,  
385

American Motorcycle Assn, District 37, 119 IBLA 196 (May 7,  
1991) Pages 136, 163, 371, 430

Ametex Corp., 121 IBLA 291 (Nov. 25, 1991) Pages 84, 85, 235

Annaco, Inc. v. OSM, 119 IBLA 158 (Apr. 30, 1991) Pages 441,  
463, 466

Animal Protection Institute of America, 118 IBLA 20 (Feb. 15,  
1991) Pages 46, 397, 480

118 IBLA 63 (Feb. 22, 1991) Pages 4, 23, 24, 397, 414, 481

118 IBLA 345 (Mar. 13, 1991) Pages 47, 405, 481

120 IBLA 342 (Sept. 12, 1991) Pages 404, 482

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991) Pages 177, 318, 324, 343, 378

Anthony, Goerge W., 119 IBLA 332 (June 18, 1991) Pages 4, 20, 484

Archer, John D., 120 IBLA 290 (Sept. 6, 1991) Pages 171, 389

Arndt, Drew H. (Mr. & Mrs.), Uniform Relocation Assistance Appeal of, 9 OHA 15 (Mar. 21, 1991) Page 478

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991), 98 I.D. 429 Pages 51, 83, 87, 243, 404

Bahe, Zonnie v. Acting Phoenix Area Director, BIA, 20 IBIA 255 (Sept. 23, 1991) Pages 49, 75

Baker, Jack & Shirley v. Muskogee Area Director, BIA, 19 IBIA 164 (Jan. 25, 1991), 98 I.D. 5 Pages 62, 199, 216

Bar First Go Round Salvage Sale et al., In re, 121 IBLA 347 (Dec. 17, 1991) Pages 136, 139, 143, 157, 235, 313, 355, 474

Bargen, Richard, 117 IBLA 239 (Jan. 3, 1991) Pages 166, 176, 303, 485, 487

Beaver, Russell A., J. F. Beaver, 121 IBLA 386 (Dec. 26, 1991) Pages 60, 162

Begay, Bob v. Acting Phoenix Area Director, BIA, 20 IBIA 248 (Sept. 20, 1991) Pages 49, 67, 198

Bell, Roseanna M., et al., 120 IBLA 153 (June 16, 1991) Page 134

Benson-Montin-Greer Drilling Corp., 118 IBLA 8 (Feb. 14, 1991) Page 353

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, BIA, 21 IBIA 88 (Dec. 18, 1991), 98 I.D. 419 Pages 221, 224, 229, 334

Bernadot, George, 121 IBLA 138 (Oct. 28, 1991) Pages 172, 383

Biersack, James R., 117 IBLA 339 (Jan. 29, 1991) Pages 88, 89, 90, 131, 359, 365, 368, 372, 373, 470, 472

Blake, Norman R., Mildred L. Blake, 119 IBLA 141 (Apr. 25, 1991) Pages 290, 475

Blaze Construction Co., Inc., Appeal of, IBCA-2863 (June 6, 1991), 98 I.D. 213 Pages 101, 104, 107, 112, 115, 119, 122, 125, 129, 301, 400, 407, 410

Blumm, Patrick G., dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991) Pages 79, 372, 395, 431

Bosch, Michael (Mr. & Mrs.), 119 IBLA 370 (June 26, 1991) Pages 162, 303, 476

Bowen, Edgar A. v. Acting Portland Area Director, BIA, 20 IBIA 263 (Sept. 23, 1991) Page 232

Braun, C. A., 119 IBLA 252 (May 16, 1991) Pages 307, 486

Brings, Patsy A., 119 IBLA 319 (June 18, 1991) Pages 298, 301, 304, 308, 429

Browne, Harry Gray, Franklyn D. Jeans, Carl W. Rimbey, 121 IBLA 218 (Nov. 13, 1991) Pages 134, 135

Bulletproofing, Inc. & Richard Medlin (President) v. Acting Phoenix Area Director, BIA, 20 IBIA 179 (Aug. 13, 1991) Pages 66, 219

Burchard, James Robert v. Acting Billings Area Director, BIA, 19 IBIA 254 (Mar. 8, 1991) Pages 63, 78, 212, 420

Button, Ramona & Harlan Bohnie v. Acting Phoenix Area Director, BIA, 21 IBIA 57 (Nov. 13, 1991) Pages 220, 221, 234

BWAB, Inc., 121 IBLA 188 (Nov. 7, 1991) Page 344

California, State of, et al., 121 IBLA 73 (Oct. 28, 1991), 98 I.D. 321 Pages 8, 360, 365, 381, 392, 418

Carlsen, Gary H. v. Acting Portland Area Director, BIA, 20 IBIA 281 (Sept. 30, 1991) Pages 225, 227

Carter, Lloyd v. Acting Billings Area Director, BIA, 20 IBIA 195 (Aug. 20, 1991) Page 207

Caugh, Gerald C. (Mr. & Mrs.), Uniform Relocation Assistance Appeal of, 9 OHA 99 (Oct. 31, 1991) Page 480

Chalwain, Peter Joseph, Estate of, 20 IBIA 128 (July 21, 1991) Page 194

Choctaw Nation of Oklahoma v. Muskogee Area Director, BIA, 19 IBIA 243 (Feb. 26, 1991) Pages 18, 73, 202

xx

Citation Oil & Gas, Ltd. v. Acting Billings Area Director, BIA, 21 IBIA 75 (Dec. 17, 1991) Pages 76, 220, 228

City of Chico, 119 IBLA 136 (Apr. 23, 1991) Pages 53, 368, 374

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991) Pages 154, 160, 183, 188

Clark, David R., 119 IBLA 367 (June 21, 1991) Pages 291, 308, 486

Coal Energy, Inc. v. OSM, 119 IBLA 111 (Apr. 18, 1991) Pages 434, 450

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991) Pages 57, 91, 170, 386

Conway, Howard J. v. Billings Area Director, BIA, 20 IBIA 29 (May 9, 1991) Page 225

Coppock, Jerry Elmer, Estate of, 20 IBIA 212 (Aug. 22, 1991) Page 191

Cordero Mining Co., 121 IBLA 314 (Dec. 4, 1991) Pages 80, 82

Corman, Jack, 119 IBLA 289 (June 6, 1991) Page 325

Dahl, Keith v. Asst Portland Area Director, BIA, 20 IBIA 225 (Aug. 28, 1991) Pages 19, 231

Dahlstrom Lumber Co. v. Portland Area Director, BIA & Mayr Bros. Logging Co., Inc., et al., 20 IBIA 143 (July 17, 1991) Pages 198, 211, 234, 432, 433

Danks, Georgianna L. v. Aberdeen Area Director, BIA, 20 IBIA 79 (June 12, 1991) Pages 19, 74, 193

Dawn Mining Co. v. Portland Area Director, BIA, 20 IBIA 50 (May 29, 1991) Pages 13, 22, 61, 64, 93, 223

D. G. & D. Logging Co. v. Billings Area Director, BIA, 20 IBIA 229 (Aug. 29, 1991) Pages 76, 156, 231

Diversified Operating Corp., 119 IBLA 107 (Apr. 15, 1991) Pages 325, 336

Douchette, Vanassa, dba Douchette Landscaping, Masonry & Paving v. Eastern Area Director, BIA, 21 IBIA 7 (Oct. 8, 1991) Page 208

Duncan Oil, Inc. v. Acting Navajo Area Director, BIA, 20 IBIA 131 (July 12, 1991) Pages 14, 22, 219, 224, 228

Eckelberg, Donald J., 117 IBLA 390 (Feb. 13, 1991) Pages 53, 320, 338

Eckert, Thelma M., 120 IBLA 367 (Sept. 18, 1991) Pages 31, 48, 381, 401, 412, 416, 421

Ellis, Ed, 118 IBLA 350 (Mar. 14, 1991) Pages 34, 40

Ely, Leona Ketcheshawno Waterman, Estate of, 20 IBIA 205 (Aug. 21, 1991) Pages 196, 197

Enron Oil & Gas Co., 117 IBLA 392 (Feb. 13, 1991) Pages 334, 337, 338

Erkins, Robert A., 121 IBLA 61 (Oct. 25, 1991) Pages 172, 388, 389

Exchange Mutual Insurance Co., 119 IBLA 296 (June 11, 1991) Pages 440, 456

Exxon Co., U.S.A., 118 IBLA 30 (Feb. 21, 1991) Pages 342, 359

119 IBLA 48 (Mar. 28, 1991) Pages 343, 357

121 IBLA 234 (Nov. 15, 1991), 98 I.D. 409 Pages 344, 350, 358

Exxon Corp., 118 IBLA 221 (Mar. 8, 1991), 98 I.D. 110 Pages 342, 350

Exxon Corp. et al. v. BLM, 118 IBLA 38 (Feb. 21, 1991) Pages 149, 152, 366, 370, 473

Fancher Oil Co., 121 IBLA 397 (Dec. 26, 1991) Pages 326, 337

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 9 OHA 17 (Mar. 26, 1991), 98 I.D. 164 Pages 2, 472

First Broadcasting of Nevada, Inc., 120 IBLA 240 (Aug. 9, 1991) Pages 58, 92, 171, 386

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991) Pages 50, 52, 68, 75

FMP Operating Co., 121 IBLA 328 (Dec. 13, 1991) Page 345

Fontenot, Vickie L., Allen J., Jr., 121 IBLA 47 (Oct. 22, 1991) Pages 153, 482

Forest Oil Corp., 9 OHA 68 (July 10, 1991), 98 I.D. 248

Four Eyes, Gus, Jr., Estate of, aka Gilford Fireshaker, 20 IBIA 22 (May 6, 1991) Pages 61, 194, 195

Franklin, William R. & Linda Smith, 121 IBLA 37 (Oct. 16, 1991) Pages 17, 143

Frazier, Mildred v. Acting Portland Area Director, BIA, 21 IBIA 11 (Oct. 8, 1991) Pages 67, 232, 233, 376

Gateway Coal Co. v. OSM, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991), 98 I.D. 70 Pages 445, 454, 457, 462, 469

Gerald Miller Construction Co., Appeal of, IBCA-2292 (Mar. 14, 1991) Pages 101, 104, 106, 108, 111, 112, 119, 121, 122, 126, 127

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991) Pages 10, 354, 393, 403, 422

Gould, Joseph B., 120 IBLA 237 (Aug. 9, 1991) Pages 325, 336

Gray, Thomas L., 121 IBLA 295 (Dec. 3, 1991) Pages 3, 21, 151, 183, 186

Greninger, Michael, 119 IBLA 383 (July 3, 1991) Pages 246, 252

Hansen, Herbert J., 119 IBLA 29 (Mar. 21, 1991) Pages 15, 144, 145, 391, 471

Hardrives, Inc., Appeals of, IBCA-2319 et al. (Feb. 6, 1991), 98 I.D. 23 Pages 114, 123, 396, 409

Harrison, Robert J. v. Acting Minneapolis Area Director, BIA, 20 IBIA 183 (Aug. 13, 1991) Page 206

Harvey, Paul & Sandra, 119 IBLA 25 (Mar. 19, 1991) Page 165

Heger, Lloyd & Sue, 121 IBLA 321 (Dec. 10, 1991) Page 375

Herod, Johnathan Z., et al., 121 IBLA 339 (Dec. 13, 1991) Pages 2, 291, 309, 367, 429, 486

Hobson, Frank, Heir of, 117 IBLA 368 (Feb. 7, 1991)  
Pages 28, 53

(On Reconsideration), 121 IBLA 66 (Oct. 25, 1991)  
Pages 6, 12, 32, 39, 54, 362, 406

Houle, Henry, Estate of, 19 IBIA 222 (Feb. 12, 1991)  
Pages 13, 46, 190, 191

Humane Society of Southern Nevada, 119 IBLA 216 (May 13, 1991)  
Pages 51, 399, 421

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991) Pages 34, 290,  
428, 432

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991) Pages 57,  
92, 170, 379, 386

Insurance Co. of North America, 120 IBLA 384 (Sept. 25, 1991)  
Pages 324, 377

Intersouth Mineral Co., Inc. v. OSM, 118 IBLA 14 (Feb. 14,  
1991) Pages 437, 444, 447, 453

Jacobs, Donald S. v. Eastern Area Director, BIA, 20 IBIA 68  
(June 10, 1991) Pages 25, 61, 201, 215

J. C. Equipment Corp., Appeals of, IBCA-2885-89 (May 31,  
1991), 98 I.D. 210 Pages 115, 124, 399, 407, 410

IBCA-2885-89 (Aug. 19, 1991), 98 I.D. 253 Pages 116, 125,  
401, 408 412

Jerome P. McHugh & Assocs. (On Reconsideration), 117 IBLA 303  
(Jan. 17, 1991) Pages 21, 189, 327, 330, 405

Jimmy, Irene K., 119 IBLA 226 (May 14, 1991) Pages 30, 38

Joe Saval Co. v. BLM, State of Nevada, Department of Wildlife  
(Intervenor), 119 IBLA 202 (May 7, 1991) Pages 160, 185, 473

Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (Mar. 14,  
1991) Pages 83, 85, 241

Kautz, Georgiana v. Portland Area Director, BIA, 19 IBIA 305  
(Apr. 18, 1991) Pages 217, 375

Kearl, Joe B., 119 IBLA 122 (Apr. 22, 1991) Pages 16, 382,  
397

Keester, Gilbert v. Acting Aberdeen Area Director, BIA,  
20 IBIA 277 (Sept. 24, 1991) Pages 19, 225, 421

Kehoe, Kevin C., 119 IBLA 257 (May 16, 1991) Pages 156, 169,  
385

Keil, Nancy Tillman v. Muskogee Area Director, BIA, 21 IBIA  
126 (Dec. 19, 1991) Pages 69, 213, 217

Kenworthy, Jack, Estate of, 21 IBIA 4 (Oct. 4, 1991) Pages  
193, 194

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991) Pages 70, 147,  
151, 155, 327, 330

Key, Edmund, 117 IBLA 274 (Jan. 16, 1991) Pages 175, 289,  
305, 482

Kialegee Tribal Town of Oklahoma v. Muskogee Area Director,  
BIA, 19 IBIA 296 (Apr. 17, 1991) Pages 62, 216

Kiowa Tribe v. Acting Anadarko Area Director, BIA, 19 IBIA 157  
(Jan. 22, 1991) Pages 18, 232, 377

Kirn, Russell R. v. Billings Area Director, BIA, 21 IBIA 53  
(Nov. 13, 1991) Page 209

Knox, Julian F., Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)  
Pages 1, 131, 132, 158, 162, 167, 181, 182, 239, 360, 366, 369

Kombol, Bernell, dba Grass Mountain Logging Co. v. Ass't  
Portland Area Director, BIA, 21 IBIA 116 (Dec. 19, 1991)  
Pages 18, 19, 121, 201, 130

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991) Pages 58, 92, 171,  
387

Kuhn, Paul F., 120 IBLA 1 (July 3, 1991), 98 I.D. 231  
Pages 436, 444, 446, 452, 455, 458, 466, 470

Laguna Gatuna, Inc., 121 IBLA 302 (Dec. 3, 1991) Pages 60,  
173, 388

Lange, Stephen S., 119 IBLA 45 (Mar. 15, 1991) Pages 320, 341

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)  
Pages 351, 378, 394, 396, 413

- Marathon Oil Co., 119 IBLA 345 (June 18, 1991) Pages 179, 349
- Marc Industries, Appeals of, IBCA-2905, -2906 (Sept. 4, 1991), 98 I.D. 263 Pages 106, 113, 120
- Markunas, Victor A., Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991) Pages 4, 88, 89, 373
- Martin, Larry v. Billings Area Director, BIA, 19 IBIA 279 (Apr. 4, 1991), 98 I.D. 200 Pages 64, 73, 123, 129, 211, 234
- Martin, W. D. (dba Martin Coal) v. OSM, 120 IBLA 279 (Aug. 30, 1991) Pages 434, 438, 449, 454, 458
- Marty Indian School, Appeals of, IBCA-2563 et al. (Jan. 17, 1991), 98 I.D. 1 Page 96
- McGregor, Burton A. & Mary H., et al., 119 IBLA 95 (Apr. 15, 1991) Pages 55, 153, 159, 398, 414, 419
- Mehaffey, Roy E. v. OSM, 117 IBLA 350 (Jan. 31, 1991) Pages 22, 189, 405, 441, 453
- Meridian Oil Co., 120 IBLA 359 (Sept. 16, 1991) Pages 327, 331
- Mespelt, Margaret L. & Theodore J. Almasy, 118 IBLA 60 (Feb. 21, 1991) Pages 41, 165
- Mill Creek Salvage Timber Sale, In re, 121 IBLA 360 (Dec. 18, 1991) Pages 95, 420
- Miller, E. Barger, III, 120 IBLA 177 (July 26, 1991) Pages 323, 371, 376, 378, 379
- Miller, Robert E., Jr., & Donald E. Rowlett v. BLM, 118 IBLA 354 (Mar. 14, 1991) Pages 183, 184, 185
- Mladinich, Karl, Victor Votaw, 120 IBLA 391 (Sept. 30, 1991) Pages 340, 353
- MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991) Pages 291, 299, 427, 472
- Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991), 98 I.D. 207 Pages 5, 51, 70, 235, 319, 348
- Moccasin, Nellie v. Acting Billings Area Director, BIA, 19 IBIA 184 (Feb. 5, 1991) Pages 214, 388, 391
- Moore, D. A., Estate of, 120 IBLA 271 (Aug. 22, 1991) Page 337

Moran Corp., 119 IBLA 178 (May 7, 1991) Pages 319, 321, 335

120 IBLA 245 (Aug. 9, 1991) Pages 5, 17, 133, 320, 322,  
329, 336, 395, 428

Murphy, Christine v. Acting Sacramento Area Director, BIA,  
19 IBIA 228 (Feb. 20, 1991) Pages 214, 223

Nat'l Park Service, 117 IBLA 247 (Jan. 9, 1991) Page 26

118 IBLA 204 (Mar. 6, 1991) Pages 29, 318, 414

Newsom, Lee Roy, et al., 117 IBLA 386 (Feb. 13, 1991)  
Page 484

Newtex Management Corp., 117 IBLA 380 (Feb. 13, 1991)  
Pages 440, 456, 462

Nez Perce Tribal Executive Committee et al., 120 IBLA 34  
(July 11, 1991) Pages 138, 141, 311, 315

Nix, Christine A. v. Acting Sacramento Area Director, BIA,  
21 IBIA 42 (Nov. 7, 1991) Pages 210, 215

Northwest Timber Affiliates, Inc., 121 IBLA 42 (Oct. 22, 1991)  
Pages 376, 383

Ocean Technology, Inc., Appeal of, IBCA-2651 (Feb. 27, 1991)  
Pages 103, 128

Olson, Donald G., 120 IBLA 166 (July 22, 1991) Pages 3, 20,  
150

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)  
Pages 56, 91, 168, 385

Oregon Cedar Products Co., 119 IBLA 89 (Apr. 9, 1991)  
Pages 47, 398

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)  
Pages 380, 392, 404, 413, 474

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991),  
98 I.D. 38 Pages 450, 451, 459, 463

Pacific Crest Outward Bound School, 117 IBLA 309 (Jan. 23,  
1991) Pages 1, 163, 180, 370, 430

Padilla, Joyce & Tony, 119 IBLA 33 (Mar. 25, 1991) Pages 9,  
78, 161, 164, 175, 427

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991) Pages 6, 148, 156, 328

Patchen, Raymond E. v. Portland Area Director, BIA, 20 IBIA 219 (Aug. 27, 1991) Pages 20, 77, 207

Pawnee Tribe of Oklahoma v. Anadarko Area Director, BIA, 20 IBIA 39 (May 21, 1991) Pages 64, 204

Pederson, Steve, Estate of, 118 IBLA 210 (Mar. 7, 1991) Pages 158, 167, 251, 290

Pegasus Helicopters, Inc., Appeal of, IBCA-2671 (Mar. 6, 1991) Pages 100, 130

Perkins, Robert A., 119 IBLA 375 (June 28, 1991) Pages 25, 41, 42, 43, 44, 364, 415

Petroleum 84-1 Ltd., 118 IBLA 372 (Mar. 14, 1991) Pages 323, 341, 352

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991) Pages 45, 69, 179, 244, 348, 357

Phillips Petroleum Co., Phillips 66 Natural Gas, 121 IBLA 278 (Nov. 19, 1991) Pages 15, 18, 50, 180, 346, 349, 350, 363, 395

Pima Country Club, Inc. v. Acting Phoenix Area Director, BIA, 21 IBIA 33 (Oct. 24, 1991) Pages 19, 23, 61, 68, 78, 222, 224

Pioneer Oil & Gas, 121 IBLA 253 (Nov. 15, 1991) Pages 326, 336

Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, BIA, 21 IBIA 45 (Nov. 12, 1991) Pages 73, 220, 222

Plumage, Charles D. v. Billings Area Director, BIA, 19 IBIA 134 (Jan. 8, 1991) Pages 62, 99, 113, 199, 218, 222, 223, 226

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991) Pages 180, 345, 349, 358

Polzer, Helen, et al. v. Minneapolis Area Director, BIA, 20 IBIA 158 (Aug. 5, 1991) Pages 66, 205

Pourier, David v. Acting Aberdeen Area Director, BIA, 19 IBIA 266 (Mar. 21, 1991) Pages 64, 77, 203

Powder River Basin Resource Council, Montana Dept. of Health &

Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991) Pages 139, 142, 310, 312, 316, 331

Power Fuels Producers, Inc. v. Acting Anadarko Area Director, BIA, 20 IBIA 190 (Aug. 16, 1991) Page 207

Questar Service Corp., 119 IBLA 65 (Mar. 29, 1991) Pages 55, 168, 384

R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142 (Oct. 28, 1991) Pages 151, 442, 464, 467

Reed, Pat, 119 IBLA 338 (June 18, 1991) Page 323

Reed, Fred A. v. Minneapolis Area Director, BIA, 19 IBIA 249 (Mar. 5, 1991) Pages 14, 63, 76, 203

Reedy, George M., et al., 120 IBLA 274 (Aug. 28, 1991) Pages 96, 152, 267, 306

Rith Energy, Inc. v. OSM, 119 IBLA 83 (Apr. 9, 1991) Pages 437, 448

Robinson, Ardis v. Acting Billings Area Director, BIA, 20 IBIA 168 (Aug. 13, 1991) Pages 79, 93, 191, 209

Robison, Reed B., RO Livestock v. BLM, 120 IBLA 181 (July 26, 1991) Pages 13, 16, 186, 187, 188, 394, 411

Rock Point Community School Board, Appeal of, IBCA-2953 (Oct. 29, 1991), 98 I.D. 355 Pages 52, 118, 126, 409

Rocky Boy Schools v. Acting Billings Area Director, BIA, 21 IBIA 112 (Dec. 19, 1991) Page 77

Rodgers Construction, Inc., Federal Insurance Co., Appeals of, IBCA-2777 et al. (Oct. 15, 1991), 98 I.D. 281 Pages 103, 118, 127, 128, 402, 417

Rosati, Peter J., 119 IBLA 219 (May 14, 1991) Pages 439, 442, 445, 451

Ruby Drilling Co., 119 IBLA 210 (May 8, 1991) Pages 352, 354

Ruth, George H., Robert E. Tudor, 121 IBLA 31 (Oct. 10, 1991) Page 361

Ryden, Charles, 119 IBLA 277 (June 6, 1991) Pages 169, 389

Salt River Project, 121 IBLA 185 (Nov. 5, 1991) Pages 59, 172, 380, 387, 390

Samsel, Lightle (Mr. & Mrs.), Uniform Relocation Assistance Appeal of, 9 OHA 8 (Feb. 28, 1991) Pages 478, 479

Sanders, Jimmie L. v. Muskogee Area Director, BIA, 19 IBIA 213 (Feb. 12, 1991) Pages 22, 76, 189, 197, 209

Sanford, Frank, et al., 119 IBLA 147 (Apr. 29, 1991) Page 30

Sauk-Suiattle Indian Tribe v. Portland Area Director, BIA, 20 IBIA 238 (Sept. 6, 1991) Pages 19, 67, 208

Severance, Owen, et al., 118 IBLA 381 (Mar. 15, 1991) Pages 137, 140, 163, 310, 317, 371, 430

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, BIA, 20 IBIA 176 (Aug. 13, 1991) Pages 18, 66, 206

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991) Pages 7, 19, 133, 148, 291, 394, 419, 429, 485, 487

Shanahan, Robert N., et al., 120 IBLA 187 (July 29, 1991) Pages 3, 5, 154, 155

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991) Pages 2, 133, 239, 355, 361

Sierra Club, Utah Chapter, 120 IBLA 347 (Sept. 13, 1991) Pages 155, 160, 172

Sierra Production Service, 118 IBLA 259 (Mar. 11, 1991) Pages 55, 161, 476

Silas, Franklin, 117 IBLA 358 (Jan. 31, 1991) Page 28

Small Rib (Standing Twenty), Johanna, Estate of, 19 IBIA 236 (Feb. 20, 1991) Pages 195, 196

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991) Pages 9, 238, 374, 487

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991) Pages 137, 140, 144, 310, 314, 317, 334

Sparlin, Rose Hyson Hardick, Estate of, 19 IBIA 153 (Jan. 11, 1991) Pages 192, 193

XXX

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991), 98 I.D. 398 Pages 132, 159, 173, 216, 218, 361, 362, 369, 390

Stark, Linda, Edward, & Fredrick v. Acting Portland Area Director, BIA, 20 IBIA 121 (July 11, 1991) Pages 74, 205

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991) Pages 30, 37, 40, 43

Steiner, Norman P., Mr. William A. Phillips, M.D., Mrs. Gloria M. Williams, Mr. Robert A. Smith, & Mrs. Grace E. Fullerton, 9 OHA 108 (Nov., 12, 1991) Pages 21, 59, 150, 157

Stone Trucking v. Portland Area Director, BIA, 19 IBIA 312 (Apr. 18, 1991) Page 204

Strong, Beryl J. & Beatrice M., 121 IBLA 309 (Dec. 3, 1991) Pages 251, 253

Suckling, Theodore (Heir of Chief Alexander), 121 IBLA 52 (Oct. 23, 1991) Pages 32, 35

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991) Pages 164, 172, 431, 477

Sunrise Mining & Exploration Co., 117 IBLA 377 (Feb. 12, 1991) Pages 245, 252

Taylor, John P., dba Taylor Logging v. Portland Area Director, BIA, 20 IBIA 101 (July 5, 1991) Pages 65, 200, 231

Taylor, Richard W., 119 IBLA 310 (June 11, 1991) Pages 5, 14, 24, 47, 71, 164, 176, 302, 306, 364, 367, 392, 400, 483

Taylor, Sybil W., 120 IBLA 193 (July 30, 1991) Pages 9, 72, 340, 353, 420

Thoman, William J. v. BLM, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991) Pages 23, 153, 187, 190, 306

Toland & Sons, Appeals of, IBCA-2716, -2717 (Aug. 7, 1991) Page 120

Trow, Joe, 119 IBLA 388 (July 3, 1991) Pages 16, 48, 51, 71, 400, 416

Tsosie, Grace v. Navajo Area Director, BIA, 20 IBIA 108 (July 9, 1991) Pages 48, 65, 74, 212, 217, 224, 226, 234

Twin Arrow, Inc., 118 IBLA 55 (Feb. 21, 1991) Page 328

Tyler, Caroline D. & James D. v. Acting Billings Area Director, BIA, 19 IBIA 144 (Jan. 8, 1991) Pages 62, 213

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)  
Pages 57, 150, 157, 163, 379, 431, 477

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)  
Pages 25, 59, 91, 170, 386, 416

U.S. Fish Corp. v. Eastern Area Director, BIA, 20 IBIA 93  
(June 25, 1991) Pages 65, 223

U.S. Gypsum Co. 121 IBLA 174 (Oct. 31, 1991) Page 240

U.S.A. v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)  
Pages 8, 12, 94, 237, 239, 250, 258, 260, 262, 267, 276, 284,  
285, 289, 297, 298, 300, 302, 305, 309, 423, 424, 426

U.S. v. Clark, Donald L. & Dorothy E., 121 IBLA 260 (Nov. 15, 1991) Pages 236, 299

U.S. v. Page, Ralph, 119 IBLA 12 (Mar. 18, 1991) Pages 7, 94,  
149, 246, 263, 270, 278, 286, 423

U.S. v. Swanson, Elmer H., 119 IBLA 53 (Mar. 29, 1991),  
98 I.D. 185 Page 307

U.S. v. White, Willie, et al., 118 IBLA 266 (Mar. 12, 1991),  
98 I.D. 129 Pages 70, 148, 245, 268, 277, 284, 286, 299

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)  
Pages 313, 316, 329, 332

121 IBLA 1 (Oct. 4, 1991), 98 I.D. 267 Pages 50, 52, 72,  
79, 321, 333

Utah Power & Light Co., 117 IBLA 271 (Jan. 15, 1991)  
Pages 81, 88

118 IBLA 181 (Mar. 6, 1991), 98 I.D. 97 Pages 80, 81

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, BIA, 21 IBIA 24 (Oct. 22, 1991) Pages 17, 199,  
210, 233, 428

Valley Camp of Utah, Inc., Coastal States Energy Co., 120 IBLA  
201 (Aug. 5, 1991) Pages 81, 83, 87

Viking Exploration, Inc., 119 IBLA 73 (Apr. 5, 1991) Pages 9,  
338

Virg-in, Marlin L., City of St. Mary's, 117 IBLA 285 (Jan. 16, 1991) Pages 35, 475, 485

Vozza, Joe H., 121 IBLA 370 (Dec. 19, 1991) Pages 166, 251

Walsh, Suzanne, 117 IBLA 267 (Jan. 15, 1991) Page 324

Ward, Peter Alvin, Estate of, 19 IBIA 196 (Feb. 5, 1991), 98 I.D. 14 Pages 192, 432, 433

Washoe Tribe of Nevada & California v. Acting Phoenix Area Director, BIA, 19 IBIA 190 (Feb. 5, 1991) Pages 63, 202

Western Energy Co., 119 IBLA 359 (June 21, 1991) Pages 82, 86, 242

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991) Pages 71, 84, 86, 240, 242

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991) Pages 54, 382, 383, 384

Western States Contracting, Inc., 119 IBLA 355 (June 18, 1991) Page 476

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991) Pages 177, 243, 346, 363

White Buffalo Construction, Inc., Application of for Fees & Expenses under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991) Pages 97, 98, 146, 147

White & McNeil Excavating, Inc., Appeal of, IBCA-2448 (Nov. 4, 1991), 98 I.D. 359 Pages 102, 105, 107, 109, 110, 130

White, Denise M., Robert M., 120 IBLA 163 (July 18, 1991) Page 339

Wilderness Society et al., 119 IBLA 168 (May 1, 1991) Pages 176, 483

Williams, Alexander, Heirs of, Heirs of George Edwin, James Butler, 121 IBLA 224 (Nov. 13, 1991) Pages 33, 36

Wilson, Horace S., 120 IBLA 395 (Oct. 3, 1991) Page 252

Wilson, Thomas B. (President), Yachts America, Inc., Uniform Relocation Assistance Appeals of, 9 OHA 59 (May 3, 1991) Page 479

Winlock Veneer Co. v. Acting Juneau Area Director, BIA,  
20 IBIA 3 (May 2, 1991) Pages 18, 99, 198, 200, 230

W. P. Corp. v. OSM, 119 IBLA 130 (Apr. 22, 1991) Pages 448,  
455

Wyoming, State of, 117 IBLA 316 (Jan. 24, 1991) Pages 241,  
342

Missing decision cites for this volume:

Farmers & Merchants Bank of Tryon, Ok. v. Muskogee Area  
Director, BIA, 21 IBIA 106 (Dec. 18, 1991)

Forest Oil Corp., 9 OHA 68 (July 10, 1991), 98 I.D. 248

Services Etcetera, Appeal of, IBCA-2941 (Aug. 22, 1991),  
98 I.D. 257

\* \* \* \* \*

SOLICITOR OPINIONS

Rights to Coalbed Methane Under an Oil & Gas Lease for Lands  
in the Jicarilla Apache Reservation, M-36970 (Oct. 16, 1990),  
98 I.D. 59 Pages 227, 230



TABLE OF OVERRULED AND MODIFIED CASES FOR THE DEPARTMENT OF  
THE INTERIOR

Ahvakana, Lucy S., 3 IBLA 341 (1971); overruled to extent inconsistent, U.S. v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

Alabama By-Products Corp., 6 IBMA 168, 1975-76 OSHD par. 20,756 (1976); set aside, 7 IBMA 85, 83 I.D. 574 (1976).

Alakayak, Macauley, Heirs of, 23 IBLA 170 (1975); vacated, (On Recon.), 62 IBLA 90 (1982).

Alaska Railroad, Appeal of, 3 ANCAB 273, 86 I.D. 397 (1979); affirmed in part, vacated in part, 3 ANCAB 351, 86 I.D. 452 (1979).

3 ANCAB 280 (1979); affirmed in part, modified in part,  
3 ANCAB 377 (1979).

Alaska, State of, 7 ANCAB 157, 89 I.D. 321 (1982); modified to extent inconsistent, 67 IBLA 344 (1982).

Alaska State of, & Seldovia Native Ass'n, Inc., Appeals of, 2 ANCAB 1, 84 I.D. 349 (1977); modified, Solicitor's Opinion, 85 I.D. 1 (1978).

Alaska, State of (Elliot R. Lind), 95 IBLA 346 (1987); vacated & rev'd, (On Recon.), 104 IBLA 12 (1988).

Alaska v. Albert, 90 IBLA 14 (1985); modified to extent inconsistent, (On Recon.), 98 IBLA 203 (1987).

Alaska v. Thorson, Alaska v. Westcoast, 76 IBLA 264 (1983); rev'd, (On Recon.), 83 IBLA 237, 91 I.D. 331 (1984).

Alexander, William T., 21 IBLA 56 (1975); reaffirmed as modified, U.S. v. Alexander, 41 IBLA 1 (1979).

Alpine Construction Co. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988); modified, Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 95 I.D. 75 (1988).

Amanda Mining & Mfg. Ass'n, 42 IBLA 144 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

AMAX Lead Co. of Missouri, 84 IBLA 102 (1984); modified, (On Recon.), 99 IBLA 313 (1987).

American Telephone & Telegraph Co., 57 IBLA 215 (1981); modified in part, (On Recon.), 59 IBLA 343 (1981).

Amoco Production Co., 24 IBLA 227 (1976); vacated, (On Recon.), 35 IBLA 43 (1978).

85 IBLA 121 (1986); affirmed as modified, (On Recon.),  
94 IBLA 129 (1986).

92 IBLA 333 (1986); vacated, (On Recon.), 96 IBLA 260  
(1987).

Anadarko Production Co., 92 IBLA 212, 93 I.D. 246 (1986);  
modified & distinguished, Celsius Energy, Inc., 99 IBLA 53,  
94 I.D. 394 (1987).

Anahonak, Victor A., 21 IBLA 347 (1975); vacated, (On Recon.),  
64 IBLA 289 (1982).

Anderson, Ida Lee, 70 IBLA 383 (1983); vacated, (On Recon.),  
73 IBLA 223 (1983).

Andrews, Peter, Sr. (On Recon.), 83 IBLA 344 (1984); overruled  
to extent inconsistent, Matilda Titus, 92 IBLA 340 (1984).

Anelon, Gregory, Sr., 21 IBLA 230 (1975); vacated, (On  
Recon.), 60 IBLA 101 (1981).

Anelon, Serafina, 22 IBLA 104 (1975); vacated, (On Recon.),  
64 IBLA 97 (1982).

Angaiak, Catherine, 23 IBLA 91 (1975); vacated & remanded,  
(On Recon.), 65 IBLA 317 (1982).

Animal Protection Institute of America, 79 IBLA 94, 91 I.D.  
115 (1984); overruled, Utah Chapter of the Sierra Club,  
121 IBLA 1, 98 I.D. 267 (1991).

Applicability of Montana Tax to Oil & Gas Leases of Ft. Peck  
Lands--Opinion of Ass't Secretary (1966); superseded to extent  
inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905  
(1977).

Archer, J. D., A-30750 (May 31, 1967); overruled, 79 I.D. 416  
(1972).

Ark Land Co., 90 IBLA 43 (1985); modified, (On Recon.),  
96 IBLA 140 (1987).

Aspinwall, Mary A. A., 23 IBLA 309 (1976); sustained in part &  
vacated in part, (On Recon.), 66 IBLA 367 (1982).

Ayouiak, Mary, 22 IBLA 384 (1975); vacated, (On Recon.),  
59 IBLA 384 (1981).

Barash, Max, 63 I.D. 51 (1956); overruled in part, Solicitor's Opinion, M-36686, 74 I.D. 285 (1967); Permian Mud Service, Inc., 31 IBLA 150, 84 I.D. 342 (1977).

Bartel, John A., A-29664 (Oct. 11, 1962); distinguished, A-30129 (Nov. 9, 1964).

Bass Enterprises Production Co., 47 IBLA 53 (1980); modified & distinguished, Celsius Energy Co., 99 IBLA 53, 94 I.D. 394 (1987).

Bayou, Philip Malcolm, 13 IBIA 200 (1985); affirmed as modified, limits Estate of Joseph Caddo, 7 IBIA 286 (1979), & Estate of William Caddo, 9 IBIA 43 (1981).

Berger, Moise & Leon, 82 IBLA 253 (1984); affirmed in part, rev'd in part, Leo Crowley, 84 IBLA 7 (1984).

Bergman, Elsie, 23 IBLA 233 (1975); vacated, (On Recon.), 64 IBLA 180 (1982).

Bergman, Steven, 22 IBLA 233 (1975); vacated, (On Recon.), 61 IBLA 399 (1982).

Bergman, Warner, 21 IBLA 173 (1975); 31 IBLA 21 (1977); vacated, (On Recon.), 60 IBLA 214 (1981).

Beveridge, R. C., 50 IBLA 173 (1980); distinguished, Curtis Wheeler, 62 IBLA 384 (1982).

Blackhawk Coal Co., (On Recon.), 92 IBLA 365, 93 I.D. 285 (1986); amended, 94 IBLA 215 (1986).

Breene James O., Jr., 38 IBLA 281 (1978); vacated, (On Recon.), 42 IBLA 395 (1979).

Brick, Irving B., 36 IBLA 235 (1978); overruled, Robert R. Furman, 49 IBLA 64 (1980).

Brinkeroff, Zula C., 75 IBLA 179 (1983); modified, Santa Fe Mining, Inc., 79 IBLA 48 (1984).

Brinton, John C., Estate of, 25 IBLA 283 (1976); vacated in part, 71 IBLA 160 (1983).

Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982); overruled to extent inconsistent, Rosander Mining Co., 84 IBLA 60 (1984).

Burns, David A., 30 IBLA 359 (1977); rev'd, Exxon Pipeline Co. v. Burns, Civ. No. A82-454 (Consolidated) (D. Alaska 1985).

xxxviii

Caldwell, Clair R., 42 IBLA 139 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).  
California Energy Co., 63 IBLA 159 (1982); rev'd, (On Recon.), 85 IBLA 254, 92 I.D. 125 (1985).

California Portland Cement Co., 40 IBLA 339 (1979); overruled, Kaiser Steel Corp., 63 IBLA 363 (1982).

California Wilderness Coalition, 101 IBLA 18 (1988); vacated in part, (On Recon.), 105 IBLA 196 (1988).

Caress, Charles, 41 IBLA 302 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Carpenter, Keith P., 112 IBLA 101 (1989); modified, (On Recon.), 113 IBLA 27 (1990).

Chesebrough, Samuel A., 49 IBLA 249 (1980); overruled to extent inconsistent, Zula C. Brinkerhoff, 75 IBLA 179 (1983).

Chiskok, Evan, 22 IBLA 153 (1975); vacated, (On Recon.), 61 IBLA 1 (1981).

Chomicki, Blanche, 51 IBLA 128 (1980); overruled, Maurice W. Coburn (On Recon.), 82 IBLA 112 (1984).

Chorney, Joan, 108 IBLA 43 (1989); vacated, (On Recon.), 109 IBLA 96 (1989)

Clipper Mining Co., 22 L.D. 527 (1896); no longer followed in part, 67 I.D. 417 (1960).

Clipper Mining Co. v. Eli Mining & Land Co., 33 L.D. 660 (1905); no longer followed in part, 67 I.D. 417 (1960).

Cohen, Ben, 21 IBLA 330 (1975); recon. denied (1977); as modified, (On Judicial Remand), 103 IBLA 316 (1988).

Colorado-Ute Electric Ass'n, Inc., 83 IBLA 358 (1984), overruled, South Central Telephone Ass'n, Inc., 98 IBLA 275 (1987).

Computation of Royalty Under Sec. 15, 51 L.D. 283 (1925); overruled, Solicitor's Opinion, M-36888, 84 I.D. 54 (1977).

Conger (Ford), Francis Ingeborg, 13 IBIA 296; modified (On Review), 13 IBIA 361, 92 I.D. 634 (1985).

Conoco, Inc., 90 IBLA 388 (1986); overruled, Celsius Energy Co., 99 IBLA 53, 94 I.D. 394 (1987).

102 IBLA 230 (1988); vacated in part, (On Recon.), 113 IBLA 243 (1990).

Continental Oil Co., 68 I.D. 186 (1961); overruled in pertinent part, Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).

74 I.D. 229 (1967); distinguished, Solicitor's Opinion, M-36927, 87 I.D. 616 (1980).

Cook Inlet Region, Inc., 90 IBLA 135, 92 I.D. 620 (1985); overruled in part, (On Recon.), 100 IBLA 50, 94 I.D. 422 (1987).

Corinth Partnership, 80 IBLA 31 (1984); vacated & remanded, (On Remand), 83 IBLA 277 (1984).

Coupey, Paul S., 33 IBLA 177 (1977); overruled to extent inconsistent, Zula C. Brinkerhoff, 75 IBLA 179 (1983).

Cranston, Monty, 67 IBLA 364 (1982); overruled to extent inconsistent, Pandora Petroleum Co., 74 IBLA 173 (1983).

Cummings, Kenneth F., 62 IBLA 206 (1982); overruled to extent inconsistent, Douglas H. Willson, 86 IBLA 135, 92 I.D. 153 (1985).

Cupper, Jerry, 45 IBLA 215 (1980); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Davidson, Robert A., 13 IBLA 368 (1973); overruled to extent inconsistent, J. Burton Tuttle, 49 IBLA 278, 87 I.D. 350 (1980).

Davis, E. W., A-29889 (1964); no longer followed in part, Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973).

Debord, Wayne E., 50 IBLA 216, 87 I.D. 465 (1980); modified, 54 IBLA 61 (1981).

Degnan, June I., 108 IBLA 282 (1989); rev'd, (On Recon.), 111 IBLA 360 (1989).

Dugan Production Corp., 103 IBLA 362 (1988); vacated, 117 IBLA 153 (1990).

Eakon, Hilma, 22 IBLA 41 (1975); vacated, (On Recon.), 64 IBLA 97 (1982).

Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974-75 OSHD par. 18,706 (1974); overruled in part, Alabama By-Products Corp. (On Recon.), 7 IBMA 85, 83 I.D. 574 (1976); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

5 IBMA 185, 82 I.D. 506, 1975-76 OSHD par. 20,041 (1975); set aside in part, (On Recon.), 7 IBMA 14, 83 I.D. 425 (1976).

Eckels, Richard W., 62 IBLA 1 (1982); modified, (On Recon.), 65 IBLA 76 (1982).

Eklutna, Appeal of, 1 ANCAB 190, 83 I.D. 619 (1976); modified, Solicitor's Opinion, 85 I.D. 1 (1978).

Energy Partners, 21 IBLA 352 (1975); distinguished, Chevron Oil Co., 32 IBLA 275 (1977).

Engelhardt, Daniel A., 61 IBLA 65 (1981); set aside, (On Recon.), 62 IBLA 93, 89 I.D. 82 (1982).

Enserch Exploration, Inc., 70 IBLA 25 (1983); overruled to extent inconsistent, Lear Petroleum Exploration, Inc., 95 IBLA 304 (1987).

Esplin, Lee J., 56 I.D. 325 (1938); overruled to extent it applies, Solicitor's Opinion, M-36914, 86 I.D. 553 (1979).

Federal-American Partners, 37 IBLA 330 (1978); overruled to extent inconsistent, Zula C. Brinkerhoff, 75 IBLA 179 (1983).

Freeman Coal Mining Co., 3 IBMA 434, 81 I.D. 723, 1974-75 OSHD par. 19,177 (1974); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

Freeman v. Summers, 52 L.D. 201 (1927); overruled, U.S. v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974); reinstated, U.S. v. Bohme, 51 IBLA 97, 87 I.D. 535 (1980).

Fults, Bill, 61 I.D. 437 (1905); overruled, 69 I.D. 181 (1962).

Garrett, Fred M., 66 IBLA 49 (1982); overruled to extent inconsistent, Pandora Petroleum Co., 74 IBLA 173 (1983).

General Electric Co., 55 IBLA 185 (1981); overruled to extent inconsistent, 56 IBLA 327 (1981).

Gifford, Samuel Lee, 53 IBLA 23 (1981); modified, (On Recon.), 55 IBLA 1 (1981).

Glassford, A. W., 56 I.D. 88 (1937); overruled to extent inconsistent, Emily K. Connell, A-29176, 70 I.D. 159 (1963).

Gold, Michael, 108 IBLA 231 (1989); modified, (On Recon.), 115 IBLA 218 (1990).

Goldbelt, Inc., 74 IBLA 308 (1983); affirmed in part, vacated in part, & remanded for evidentiary hearing, 85 IBLA 273, 92 I.D. 134 (1985).

Golden Valley Electric Ass'n, 85 IBLA 363 (1985); vacated, (On Recon.), 98 IBLA 203 (1987).

Gosuk, Jack, 22 IBLA 392 (1975); vacated, (On Recon.), 54 IBLA 306 (1981).

Gray, Eleanor A., A-28710 (1962); vacated as to Claim No. 4, A-28710 (Supp.) (May 7, 1964).

Gulf Oil Exploration & Production Co., 94 IBLA 364 (1986); modified, Atlantic Richfield Co., 105 IBLA 218, 95 I.D. 235 (1988).

Hagood, L. N., 65 I.D. 405 (1958); overruled, Beard Oil Co., 77 I.D. 166 (1970).

Hanlon, Christina Lavern, 23 IBLA 36 (1975); vacated, Andrew Gordon McKinley (On Recon.), 61 IBLA 282 (1982).

Hays, Alice, 36 IBLA 313 (1978); distinguished, Curtis Wheeler, 62 IBLA 384 (1982).

Hiko Bell Mining & Oil Co., 93 IBLA 143 (1986); sustained as modified, (On Recon.), 100 IBLA 371, 95 I.D. 1 (1988).

Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).

Hulsman, Lorinda L., 32 IBLA 280 (1977); overruled, James R. Hensher, 85 IBLA 343, 92 I.D. 140 (1985).

Hunt, Emily B., 23 IBLA 205 (1976); vacated, (On Recon.), 64 IBLA 304 (1982).

Idaho Dept. of Water Resources, 32 IBLA 89 (1977); vacated, (On Recon.), 49 IBLA 221 (1980).

Jacobsen, Stoddard v. BLM, 97 IBLA 182 (1987); overruled in part, (On Recon.), 103 IBLA 83 (1988).

Jaycox, Myrtle, 22 IBLA 324 (1975); vacated, (On Recon.), 64 IBLA 97 (1982).

Jerome P. McHugh & Assocs., 113 IBLA 341 (1990); vacated, (On Recon.), 117 IBLA 303 (1991)

Johansen, Daniel, 23 IBLA 292 (1976); vacated, (On Recon.), 54 IBLA 295 (1981).

Jones, Sam P., 74 IBLA 242 (1983); affirmed in part as modified, & vacated in part, (On Judicial Remand), 84 IBLA 331 (1985).

Kaguk, Luke F., 84 IBLA 350 (1985); overruled to extent inconsistent, Stephen Northway, 96 IBLA 301 (1987).

Keating Gold Mining Co., 52 L.D. 671 (1929); overruled in part, Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972).

Keller, Herman A., 14 IBLA 188, 81 I.D. 26 (1974); distinguished, Robert E. Belknap, 55 IBLA 200 (1981).

Kenai Natives Ass'n, 87 IBLA 58 (1985); overruled to extent inconsistent, Matilda Titus, 92 IBLA 340 (1986).

Kenyon, Stephen, 51 IBLA 368 (1980); vacated in part, (On Recon.), 65 IBLA 44 (1982).

Kern County Land Co. (On Recon.), IA-0168748, IA-0170927, & IA-0170928; approved by Under Secretary Carver, Oct. 25, 1965; not followed to extent inconsistent with this opinion.

Kerr-McGee Nuclear Corp., 41 IBLA 197 (1979); rev'd, (On Recon.), 43 IBLA 348 (1979).

Kight, W. Verne, 47 IBLA 351 (1980); rev'd in part, (On Recon.), 61 IBLA 216 (1982).

Konukpeok, Nora E., 23 IBLA 86 (1975); vacated, (On Recon.), 60 IBLA 394 (1981).

L. A. Melka Marine Construction & Diving Co., Inc., IBCA-1511-9-81, 90 I.D. 322 (1983); vacated & appeal dismissed, (On Recon.), IBCA-1511-9-81, 90 I.D. 491 (1983).

Land Classification State of California, A-31022 (Aug. 14, 1968 & Jan. 23, 1969); overruled to extent inconsistent, A-31022 (Oct. 14, 1969); as amended, Oct. 27, 1969.

Layne & Bowler Export Corp., IBCA-245, 68 I.D. 33 (1961); overruled insofar as it conflicts, Schweigert, Inc. v. U.S., Ct. Cl. No. 26-66 (Dec. 15, 1967), & Galland-Henning Mfg. Co., IBCA-34-12-65 (Mar. 29, 1968).

Liability of Indian Tribes for State Taxes Imposed on Royalty Received From Oil & Gas Leases, 58 I.D. 535 (1943); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

Liberty Petroleum Corp., 73 IBLA 368 (1983); rev'd, ANR Production Co., 82 IBLA 228 (1984).

Lingren, Sarah F., 23 IBLA 174 (1975); vacated, (On Recon.), 54 IBLA 181 (1981).

Liss, Merwin E., 67 I.D. 385 (1960); overruled, Arthur E. Meinhardt, 11 IBLA 139, 80 I.D. 395 (1973).

Lomax Exploration Co., 105 IBLA 1 (1988); modified, Ladd Petroleum Corp., 107 IBLA 5 (1989).

Luke, Louise, 22 IBLA 388 (1975); vacated, (On Recon.), 60 IBLA 399 (1981).

Luse, Jeanette L., 61 I.D. 103 (1953); distinguished, Richfield Oil Corp., 71 I.D. 243 (1964).

Lyles, Clayton, Mr. & Mrs., & Messrs. Lonnie & Owen Lyles, Uniform Relocation Assistance Appeal of, 8 OHA 23 (1989); modified, (On Recon. by Director), 8 OHA 94 (1989).

Lynn, Robert G., 70 IBLA 141 (1983); vacated, (On Recon.), 73 IBLA 288 (1983).

Lytle, Frank C., III, 69 IBLA 210 (1982); overruled to extent inconsistent, L. Lee Horschman, 74 IBLA 360 (1983).

Malesky, James A., 102 IBLA 175 (1988); rev'd, (On Recon.), 106 IBLA 327 (1989).

Manzonie, John & Adellie, I.G.D. 615; distinguished, A-29334 (July 26, 1963).

Marathon Oil Co., 94 IBLA 78 (1986); vacated in part, (On Recon.), 103 IBLA 138 (1988).

Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, U.S. v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

McMurtrie, Nancy, 73 IBLA 247 (1983); overruled to extent inconsistent, Shaw Resources, Inc., 79 IBLA 153, 91 I.D. 122 (1984).

Mead, Robert E., 61 I.D. 111 (1955); overruled, Jones-O'Brien, Inc., 85 I.D. 89 (1978).

Memmott, Sandra, 88 IBLA 379 (1985); reaffirmed as modified, (On Recon.), 93 IBLA 113 (1986).

Merritt-Chapman & Scott Corp., IBCA-257 (June 22, 1961); distinguished, IBCA-274 (Sept. 15, 1961).

Mertz, Dennis J., 43 IBLA 302 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Mezey, Cliff, 50 IBLA 157 (1980); vacated, (On Recon.), 66 IBLA 178 (1982).

Michigan Wisconsin Pipeline Co., 64 IBLA 247 (1982); vacated in part, (On Recon.), 80 IBLA 317 (1984).

Mikesell, Henry D., A-24112 (Mar. 11, 1946); rehearing denied (June 20, 1946); overruled to extent inconsistent, 70 I.D. 149 (1963).

Miller, Duncan, A-29760 (Sept. 18, 1963); A-30742 (Dec. 2, 1966); and A-30722 (Apr. 14, 1967); overruled, 6 IBLA 216, 79 I.D. 416 (1972).

Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 85 I.D. 89 (1978).

Mingo Oil Producers, 94 IBLA 384 (1986); vacated, (On Recon.), 98 IBLA 133 (1987).

Minnier, Willene, 45 IBLA 1 (1980); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Mobil Oil Corp., 35 IBLA 375, 85 I.D. 225 (1978); limited in effect, Carl Gerard, 70 IBLA 343 (1983).

Morgan, Henry S., 65 I.D. 369 (1958); overruled to extent inconsistent, 71 I.D. 22 (1964).

Moses, Beulah, 21 IBLA 157 (1975); vacated, (On Recon.), 60 IBLA 252 (1981).

Mountain Fuel Supply Co., A-31053 (Dec. 19, 1969); overruled, 6 IBLA 216, 79 I.D. 416 (1972).

Munsey v. Smitty Baker Coal Co., Inc., 1 IBMA 144; 79 I.D. 501 (1972); distinguished, Sewell Coal Co., 2 IBMA 80, 80 I.D. 251 (1973).

Muslow, James, Sr., 51 IBLA 19 (1980); affirmed in part, rev'd in part, (On Recon.), 65 IBLA 352 (1982).

Myll, Clifton O., 71 I.D. 458 (1964); supplemented, 71 I.D. 486 (1964); vacated, 72 I.D. 536 (1965).

Nat'l Livestock Co., I.G.D. 55 (1938); overruled, U.S. v. Maher, 5 IBLA 209, 79 I.D. 109 (1972).

Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); distinguished, Kristeen J. Burke, 20 IBLA 162 (1975).

Nenana, City of, 98 IBLA 177 (1987); as modified, (On Recon.), 106 IBLA 26 (1988), vacated, Toghotthele Corp. v. Luhan, No. 89-1763 (Aug. 1, 1991).

New Mexico, State of, 24 IBLA 135 (1976); vacated, (On Recon.), 50 IBLA 367 (1980).

Northway Natives, Inc., 69 IBLA 219 (1982); overruled to extent inconsistent, U.S. Fish & Wildlife Service, 72 IBLA 218 (1983).

Northwest Pipeline Co., 65 IBLA 245 (1982); set aside, (On Recon.), 77 IBLA 46 (1983).

Northwestern Colorado Broadcasting Co., 18 IBLA 62 (1974); overruled, Peregrine Broadcasting Co., 62 IBLA 133 (1982).

Oil & Gas Privilege & License Tax, Fort Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

Opinion of Assoc. Solicitor (Lands), M-34999 (Oct. 22, 1947); distinguished, Solicitor's Opinion, M-36613, 68 I.D. 433 (1961).

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Opinion of Chief Counsel, 43 L.D. 339 (1914); explained, Solicitor's Opinion, M-36634, 68 I.D. 372 (1961).

Opinion of Deputy Ass't Secy (Dec. 2, 1966); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

Opinion of Secy, M-36733, 75 I.D. 147 (1968); vacated, Solicitor's Opinion, M-36733 (Supp.), 76 I.D. 69 (1969).

Opinion of Solicitor, 55 I.D. 14 (1934); overruled so far as inconsistent, Solicitor's Opinion, M-36803, 77 I.D. 49 (1970).

Opinion of Solicitor, M-27690 (June 15, 1934); overruled to extent of conflict, Solicitor's Opinion, M-36936, 88 I.D. 586 (1981).

Opinion of Solicitor, M-28198 (Jan. 8, 1936); finding inter alia, Indian title extinguished, is well founded, & is affirmed, Solicitor's Opinion, M-36886, 84 I.D. 1 (1977); overruled, Solicitor's Opinion, M-36908, 86 I.D. 3 (1979).

Opinion of Solicitor, 55 I.D. 466 (1936); overruled to extent it applies to 1926 Exec. Order, Solicitor's Opinion, M-36914, 86 I.D. 553 (1979).

Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).

Opinion of Solicitor, M-36047, 60 I.D. 436 (1950); will not be followed to extent of conflict, Solicitor's Opinion, M-36677, 72 I.D. 92 (1965).

Opinion of Solicitor, M-36051 (Dec. 7, 1950); modified, Solicitor's Opinion, M-36863, 79 I.D. 51 (1972).

Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled as far as inconsistent, Solicitor's Opinion, M-36907, 85 I.D. 433 (1978).

Opinion of Solicitor, M-36410 (Feb. 11, 1957); overruled to extent of conflict, Solicitor's Opinion, M-36936, 88 I.D. 586 (1981).

Opinion of Solicitor, M-36429, 64 I.D. 393 (1957); no longer followed, B. E. Burnaugh, A-28340 (Supp.), 67 I.D. 366 (1960).

Opinion of Solicitor, M-36434 (Sept. 12, 1958); overruled to extent inconsistent, Turner Smith, Jr., 66 IBLA 1, 89 I.D. 386 (1982).

Opinion of Solicitor, M-36456, 64 I.D. 435 (1957); not followed to extent it conflicts with these views, Solicitor's Opinion, M-36456 (Supp.), 76 I.D. 14 (1969).

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Opinion of Solicitor, M-36910, 86 I.D. 89 (1979); modified, Solicitor's Opinion, M-36910 (Supp.), 88 I.D. 909 (1981).

Opinion of Solicitor, M-36915, 86 I.D. 400 (1979); modified to extent inconsistent, Solicitor's Opinion, M-36915 (Supp. I), 90 I.D. 255 (1983).

Oregon Alder-Maple Co., 1 IBLA 241 (1971); distinguished, Nordic Veneers, Inc., 3 IBLA 86 (1971).

Oregon Portland Cement Co., 66 IBLA 204 (1982); vacated, (On Judicial Remand), 84 IBLA 186 (1984).

Orem Development Co. v. Calder, A-26604 (Dec. 18, 1953); decision set aside & case remanded, (On Recon.), 90 I.D. 223 (1983).

Page, Ralph, 8 IBLA 435 (1972); explained, Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).

Paine, John A., 22 IBLA 56 (1975); vacated, 66 IBLA 77 (1982).

Peters, Curtis D., 13 IBIA 4, 80 I.D. 595 (1973); overruled, James R. Hensher, 85 IBLA 343, 92 I.D. 140 (1985).

Phebus, Clayton, 48 L.D. 128 (1921); overruled so far as in conflict, 50 L.D. 281 (1924); overruled to extent inconsistent, Emily K. Connell, A-29176, 70 I.D. 159 (1963).

Phillips, Cecil H., A-30851 (Nov. 16, 1967); overruled, Duncan Miller, 6 IBLA 216, 79 I.D. 416 (1972).

Phillips, Vance W., 14 IBLA 79 (1973); modified, Vance W. Phillips, 19 IBLA 211 (1975).

Plomis, Wilfred, 62 IBLA 162 (1982); modified in part, Horace H. Alvord, IV, 80 IBLA 49 (1984).

Provinse, David A., 35 IBLA 221, 85 I.D. 154 (1978); overruled to extent inconsistent, 89 IBLA 154 (1985).

49 IBLA 134 (1980); overruled to extent inconsistent, 57 IBLA 319 (1981).

Ranger Fuel Corp., 2 IBMA 163, 80 I.D. 708 (1973); set aside, Ranger Fuel Corp., 2 IBMA 186, 80 I.D. 604 (1973).

Rayburn, Ethel Cowgill, A-28866 (Sept. 6, 1962); modified, T. T. Cowgill, 19 IBLA 274 (1975).

Reich, Harry, 27 IBLA 123 (1976); distinguished, 57 IBLA 357 (1981).

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971); distinguished, Zeigler Coal Corp., 1 IBMA 71, 78 I.D. 362 (1971).

Relocation of Flathead Irrigation Project's Kerr Substation & Switchyard, M-36735 (Jan. 31, 1968); rev'd & withdrawn, Solicitor's Opinion, M-36735 (Supp.), 83 I.D. 346 (1976).

Renwick, Richard, 76 IBLA 57 (1983); rev'd & remanded, (On Recon.), 78 IBLA 360 (1984).

Republic Oil & Mining Co., 35 IBLA 212 (1978); distinguished, Curtis Wheeler, 62 IBLA 384 (1982).

Resources Exploration & Mining, Inc., 42 IBLA 63 (1979); modified, (On Recon.), 43 IBLA 89 (1979).

Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460 (1982); modified to extent inconsistent, Kimberly Sue Coal Co., Inc., 74 IBLA 170 (1983).

Ricci, Charles P., 33 IBLA 288 (1978); set aside & remanded, (On Recon.), 34 IBLA 186 (1978).

Ross, John R., A-27259 (Mar. 12, 1956); set aside in part, Robert C. Ellis, A-29185 (Sept. 9, 1964).

Sanford, Nora L., 43 IBLA 74 (1979); vacated, (On Recon.), 63 IBLA 335 (1982).

Schweite, Helena M., 14 IBLA 305 (1974); distinguished, Kristeen J. Burke, 20 IBLA 162 (1975).

Seggerson, Edward, Jr., 67 IBLA 189 (1982); modified, (On Recon.), 74 IBLA 267 (1983).

Shaw Resources, Inc., 73 IBLA 291 (1983); reconsidered & modified, 79 IBLA 153, 91 I.D. 122 (1984).

Shillander, H. E., A-30279 (Jan. 26, 1965); overruled, 6 IBLA 216, 79 I.D. 416 (1972).

Sierra Club, 79 IBLA 240 (1984); set aside, (On Recon.), 84 IBLA 175 (1984).

Silver Spot Metals, Inc., 51 IBLA 212 (1980); overruled to extent inconsistent, Zula C. Brinkeroff, 75 IBLA 179 (1983).

Simpson, Robert E., A-4167 (Jan. 22, 1970); overruled to extent inconsistent, U.S. v. Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Smith, James W. (IBLA 80-57 & IBLA 80-67), 46 IBLA 233 (1980); IBLA 80-67; dismissed, 55 IBLA 390 (1981).

Smith, M. P., 51 L.D. 251 (1925); overruled, Solicitor's Opinion, M-36888, 84 I.D. 54 (1977).

Snow, George Val, 46 IBLA 101 (1980); vacated, (On Judicial Remand), 79 IBLA 261 (1984).

Standard Oil Co. of California, 76 I.D. 271 (1969); no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).

Southern Utah Wilderness Alliance, 100 IBLA 63 (1987); overruled, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267 (1991).

Star Gold Mining Co., 47 L.D. 38 (1919); distinguished, U.S. v. Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).

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Stevens, David E., 23 IBLA 221 (1976); vacated, 64 IBLA 72 (1982).

Stevens, Marion, 23 IBLA 280 (1976); vacated, 64 IBLA 69 (1982).

St. Pierre v. Comm'r of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982); overruled, Burnette v. Deputy Ass't Secretary--Indian Affairs (Operations), 10 IBIA 464, 89 I.D. 609 (1982).

Superior Oil Co., A-28897 (Sept. 12, 1962); distinguished in dictum, 6 IBLA 318, 79 I.D. 439 (1972).

T.E.T. Partnership, 84 IBLA 10 (1984); petition granted & prior decision vacated, (On Recon.), 88 IBLA 13 (1985).

Tevuk, David, 22 IBLA 296 (1975); rev'd & remanded, (On Recon.), 29 IBLA 296 (1975).

Thomas, John C., 53 IBLA 182 (1981); vacated, (On Recon.), 59 IBLA 364 (1981).

Tibbetts, R. Gail, 43 IBLA 210, 86 I.D. 538 (1979); overruled in part, Hugh B. Fate, Jr., 86 IBLA 215 (1985).

Titus, Walter, 22 IBLA 233 (1975); vacated & remanded, (On Recon.), 77 IBLA 321 (1983).

Towl v. Kelly, 54 I.D. 455 (1934); overruled, Ralph F. Rosenbaum, 66 IBLA 374, 89 I.D. 415 (1982).

Tugatuk, Anuska, 23 IBLA 182 (1976); vacated, (On Recon.), 59 IBLA 345 (1981).

Union Oil Co., 56 IBLA 206 (1981); vacated, (On Recon.), 58 IBLA 166 (1981).

Union Oil Co. of California (Supp.), 72 I.D. 313 (1965); overruled & rescinded in part, U.S. v. Energy Resources Technology Land, Inc., 74 IBLA 117 (1983).

United Indians of All Tribes Foundation v. Acting Deputy Ass't Secretary--Indian Affairs, 11 IBIA 226 (1983); vacated in part, 11 IBIA 276, 90 I.D. 376 (1983).

U.S. Forest Service v. Milender, 86 IBLA 181, 95 I.D. 175 (1985); rev'd & modified in part, 104 IBLA 207, 95 I.D. 155 (1988).

U.S. v. Aiken Builders Products, 95 IBLA 55 (1986); (On Recon.), 102 IBLA 70 (1988); vacated by memo decision of the Secy, 102 IBLA 85A (1989).

U.S. v. Barngrover (On Rehearing), 57 I.D. 533 (1942); overruled in part, U.S. v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975).

U.S. v. Cohan, 70 I.D. 178 (1973); overruled in part, U.S. Forest Service v. Milender, 86 IBLA 181, 92 I.D. 175 (1985).

U.S. v. Edeline, 39 IBLA 236 (1979); overruled to extent inconsistent, U.S. v. Feezor, 74 IBLA 56, 90 I.D. 262 (1983). U.S. v. Feezor, 74 IBLA 56, 90 I.D. 262 (1983); vacated in part & remanded, (On Recon.), 81 IBLA 94 (1984).

U.S. v. Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285 (1971); set aside & remanded, 12 IBLA 282, 80 I.D. 538 (1973).

U.S. v. Livingston Silver, Inc., 43 IBLA 84 (1979); overruled to extent inconsistent, U.S. v. Parker, 82 IBLA 344, 91 I.D. 271 (1984).

U.S. v. McClarty, 71 I.D. 331 (1964); vacated & remanded, 76 I.D. 193 (1969).

U.S. v. Melluzzo, A-31042, 76 I.D. 181 (1969); set aside, (On Recon.), 1 IBLA 37, 77 I.D. 172 (1970).

U.S. v. Mills, 91 IBLA 370 (1986); affirmed, (On Recon.), 94 IBLA 59 (1986).

U.S. v. Nelson, 8 IBLA 294 (1972); vacated, 28 IBLA 314 (1977).

U.S. v. Swanson, 34 IBLA 25 (1978); modified, 93 IBLA 1, 93 I.D. 288 (1986).

Utah Wilderness Ass'n, 91 IBLA 124 (1986); overruled, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267 (1991).

Utah Wilderness Ass'n (I), 72 IBLA 125 (1982); affirmed in part, rev'd in part, 86 IBLA 89 (1985).

Village & City Council of Aleknagik, 77 IBLA 130 (1983); modified in part, (On Recon.), 80 IBLA 221 (1984).

(On Recon.), 80 IBLA 221 (1984); modified, Eugene M. Witt, 90 IBLA 265 (1986).

Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604 (1982); modified to extent inconsistent, Kimberly Sue Coal Co., Inc., 74 IBLA 170 (1983).

Wall, Irvin, 70 IBLA 183, 90 I.D. 3 (1983); vacated, (On Recon.), 80 IBLA 339 (1984).

Wasserman, Jacob N., A-30275 (Sept. 22, 1964); overruled, 6 IBLA 216, 79 I.D. 416 (1972).

Wassillie, Elia, 23 IBLA 276 (1976); vacated, (On Recon.), 59 IBLA 361 (1981).

Wassillie, Madrona, Heirs of, 23 IBLA 131 (1975); vacated, (On Recon.), 64 IBLA 167 (1982).

Waters, Valda, 44 IBLA 272 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Welch v. Minneapolis Area Director, 16 IBIA 180 (1988); rev'd, 17 IBIA 56 (1989).

Western Aggregates of Mineral & Rock, Inc., 34 IBLA 164 (1978); modified, James W. Smith (On Recon.), 55 IBLA 390 (1981).

Western Slope Gas Co., 40 IBLA 280; reconsideration denied, 43 IBLA 259 (1979); overruled in pertinent part, Solicitor's Opinion, M-36917, 87 I.D. 27 (1980).

Wexpro Co., 90 IBLA 394 (1986); overruled, Celsius Energy Co., 99 IBLA 53, 94 I.D. 394 (1987).

Weyerhaeuser Co., 33 IBLA 254 (1978); rev'd & remanded, (On Recon.), 34 IBLA 244 (1978).

Williams, Wayne C., 23 IBLA 88 (1975); vacated, (On Recon.), 61 IBLA 181 (1982).

Williamson, Lee B., 54 IBLA 326 (1981); overruled to extent inconsistent, 57 IBLA 319 (1981).

Wilson, Earl R., 21 IBLA 392 (1975); modified & distinguished, Cecil A. Walker, 26 IBLA 71 (1976).

Winchester Land & Cattle Co., 65 I.D. 148 (1958); no longer followed in part, Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973).

Winters, Raymond W., A-28125 (Jan. 15, 1960); overruled, Forest Oil Corp., 15 IBLA 33 (1974).

Wolf Joint Ventures, 75 I.D. 137 (Sept. 5, 1968); distinguished, U.S. v. Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Wostenberg, William, A-26450 (1952); distinguished in dictum, 6 IBLA 318, 79 I.D. 439 (1972).

Young Bear, Victor, Estate of, 8 IBIA 130, 87 I.D. 311 (1980); rev'd, (Supp.), 8 IBIA 254, 88 I.D. 410 (1981).

Zeigler Coal Co., 4 IBMA 139, 82 I.D. 221 (1975); OSHD par. 19,638 (1975); overruled in part, Alabama By-Products Corp. (On Recon.), 7 IBMA 85, 83 I.D. 574 (1976).



TABLES OF U.S. STATUTES AT LARGE, REVISED STATUTES, AND U.S.  
CODES

5 STAT.

page 31 ----- 121 IBLA 31 (Oct. 10, 1991)

9 STAT.

page 41 ----- IBCA-2777 et al., 98 I.D. 281  
(1991)  
631 ----- 121 IBLA 73, 98 I.D. 321 (1991)  
929-930 ----- 121 IBLA 73, 98 I.D. 321 (1991)

10 STAT.

page 170 ----- IBCA-2777 et al., 98 I.D. 281  
(1991)  
265 ----- 121 IBLA 73, 98 I.D. 321 (1991)  
603 ----- 121 IBLA 73, 98 I.D. 321 (1991)

11 STAT.

page 699 ----- 19 IBIA 296 (Apr. 17, 1991)

12 STAT.

page 33 ----- 121 IBLA 73, 98 I.D. 321 (1991)  
489 ----- 118 IBLA 78 (Feb. 27, 1991)  
492 ----- 118 IBLA 78 (Feb. 27, 1991)  
971 ----- 19 IBIA 196, 98 I.D. 14 (1991)

13 STAT.

page 332 ----- 121 IBLA 73, 98 I.D. 321 (1991)  
356-8 ----- 118 IBLA 78 (Feb. 27, 1991)

14 STAT.

page 541 ----- 119 IBLA 141 (Apr. 25, 1991)  
542 ----- 119 IBLA 141 (Apr. 25, 1991)  
785 ----- 19 IBIA 296 (Apr. 17, 1991)

lvi

17 STAT.

page 91 ----- 117 IBLA 386 (Feb. 13, 1991)  
607 ----- 121 IBLA 339 (Dec. 13, 1991)

23 STAT.

page 26 ----- 117 IBLA 247 (Jan. 9, 1991)

24 STAT.

page 388 ----- 19 IBIA 254 (Mar. 8, 1991)  
19 IBIA 196, 98 I.D. 14 (1991)

26 STAT.

page 712 ----- 19 IBIA 228 (Feb. 20, 1991)  
794 ----- 19 IBIA 254 (Mar. 8, 1991)

28 STAT.

page 635 ----- 117 IBLA 281 (Jan. 16, 1991)

30 STAT.

page 495 ----- 19 IBIA 164, 98 I.D. 5 (1991)

31 STAT.

page 861 ----- 19 IBIA 296 (Apr. 17, 1991)

32 STAT.

page 388 ----- 119 IBLA 252 (May 16, 1991)  
121 IBLA 386 (Dec. 26, 1991)  
500 ----- 19 IBIA 296 (Apr. 17, 1991)

33 STAT.

page 616 ----- 119 IBLA 147 (Apr. 29, 1991)

## 34 STAT.

page 192 ----- 119 IBLA 147 (Apr. 29, 1991)  
 197 ----- 118 IBLA 334 (Mar. 12, 1991)  
 121 IBLA 66 (Oct. 25, 1991)

## 35 STAT.

page 312 ----- 19 IBIA 164, 98 I.D. 5 (1991)

## 36 STAT.

page 583 ----- 121 IBLA 339 (Dec. 13, 1991)  
 847 ----- 121 IBLA 339 (Dec. 13, 1991)  
 855 ----- 119 IBLA 252 (May 16, 1991)

## 37 STAT.

page 497 ----- 121 IBLA 339 (Dec. 13, 1991)

## 41 STAT.

page 437 ----- 120 IBLA 177 (July 26, 1991)  
 449 ----- 120 IBLA 177 (July 26, 1991)

## 42 STAT.

page 465 ----- 120 IBLA 187 (July 29, 1991)

## 43 STAT.

page 1090 ----- 120 IBLA 187 (July 29, 1991)

## 45 STAT.

page 629 ----- 120 IBLA 324 (Sept. 12, 1991)

## 45 STAT.

page 495 ----- 19 IBIA 164, 98 I.D. 5 (1991)

46 STAT.

page 1007 ----- 118 IBLA 221, 98 I.D. 110 (1991)

47 STAT.

page 446 ----- 119 IBLA 147 (Apr. 29, 1991)  
777 ----- 19 IBIA 164, 98 I.D. 5 (1991)

48 STAT.

page 984 ----- 19 IBIA 164, 98 I.D. 5 (1991)  
985 ----- 19 IBIA 164, 98 I.D. 5 (1991)

49 STAT.

page 1135 ----- 19 IBIA 164, 98 I.D. 5 (1991)  
1967 ----- 19 IBIA 164, 98 I.D. 5 (1991)

52 STAT.

page 347 ----- M-36970, 98 I.D. 59 (1990)  
1241 ----- 20 IBLA 143 (July 17, 1991)

58 STAT.

page 132 ----- 20 IBIA 143 (July 17, 1991)

61 STAT.

page 418 ----- 119 IBLA 147 (Apr. 29, 1991)  
681 ----- 117 IBLA 386 (Feb. 13, 1991)  
120 IBLA 76A (July 15, 1991)  
731 ----- 19 IBIA 164, 98 I.D. 5 (1991)  
19 IBIA 318 (Apr. 18, 1991)  
732 ----- 19 IBIA 164, 98 I.D. 5 (1991)  
19 IBIA 318 (Apr. 18, 1991)

64 STAT.

page 769 ----- 119 IBLA 116 (Apr. 22, 1991)

## 69 STAT.

page 375 ----- 119 IBLA 257 (May 16, 1991)

## 70 STAT.

page 377 ----- 119 IBLA 147 (Apr. 29, 1991)

## 72 STAT.

page 27 ----- 117 IBLA 239 (Jan. 3, 1991)  
 329 ----- 118 IBLA 350 (Mar. 14, 1991)  
 340 ----- 119 IBLA 1 (Mar. 15, 1991)  
 968 ----- 119 IBIA 228 (Feb. 20, 1991)

## 73 STAT.

page 141 ----- 119 IBLA 147 (Apr. 29, 1991)  
 145 ----- 119 IBLA 147 (Apr. 29, 1991)  
 145-46 ----- 119 IBLA 147 (Apr. 29, 1991)  
 427 ----- 19 IBIA 196, 98 I.D. 14 (1991)  
 571 ----- 118 IBLA 372 (Mar. 14, 1991)

## 74 STAT.

page 781 ----- 118 IBLA 372 (Mar. 14, 1991)

## 76 STAT.

page 913 ----- 19 IBIA 196, 98 I.D. 14 (1991)

## 78 STAT.

page 891 ----- 117 IBLA 274 (Jan. 16, 1991)

## 82 STAT.

page 907 ----- 119 IBLA 388 (July 3, 1991)  
 910 ----- 119 IBLA 388 (July 3, 1991)

## 84 STAT.

page 1566 ----- 119 IBLA 116 (Apr. 22, 1991)

1x

85 STAT.

page 688	-----	119	IBLA 375	(June 28, 1991)
		121	IBLA 66	(Oct. 25, 1991)
701	-----	119	IBLA 375	(June 28, 1991)
708	-----	119	IBLA 375	(June 28, 1991)
710	-----	121	IBLA 66	(Oct. 25, 1991)

87 STAT.

page 429	-----	119	IBLA 89	(Apr. 9, 1991)
447	-----	119	IBLA 89	(Apr. 9, 1991)
885	-----	121	IBLA 347	(Dec. 17, 1991)

88 STAT.

page 190	-----	121	IBLA 347	(Dec. 17, 1991)
192	-----	120	IBLA 374	(Sept. 19, 1991)

89 STAT.

page 1145	-----	119	IBLA 375	(June 28, 1991)
1151	-----	119	IBLA 375	(June 28, 1991)
1152	-----	119	IBLA 375	(June 28, 1991)
1153	-----	119	IBLA 301	(June 11, 1991)
1369	-----	119	IBLA 332	(June 18, 1991)

90 STAT.

page 1934	-----	119	IBLA 375	(June 28, 1991)
1935	-----	119	IBLA 375	(June 28, 1991)
2327	-----	119	IBLA 388	(July 3, 1991)
2743	-----	120	IBLA 187	(July 29, 1991)
		121	IBLA 339	(Dec. 13, 1991)
2786	-----	121	IBLA 339	(Dec. 13, 1991)
2787	-----	119	IBLA 122	(Apr. 22, 1991)
		119	IBLA 125	(Apr. 22, 1991)
		121	IBLA 31	(Oct. 10, 1991)
2789	-----	119	IBLA 122	(Apr. 22, 1991)
		119	IBLA 141	(Apr. 25, 1991)
		119	IBLA 319	(June 18, 1991)
2790	-----	117	IBLA 285	(Jan. 16, 1991)
2792	-----	121	IBLA 31	(Oct. 10, 1991)
		121	IBLA 339	(Dec. 13, 1991)
2793	-----	117	IBLA 281	(Jan. 16, 1991)

91 STAT.

page 514	-----	121 IBLA 142 (Oct. 28, 1991)
1369	-----	119 IBLA 375 (June 28, 1991)

93 STAT.

page 386	-----	119 IBLA 375 (June 28, 1991)
----------	-------	------------------------------

94 STAT.

page 947	-----	119 IBLA 375 (June 28, 1991)
1207	-----	19 IBIA 196, 98 I.D. 14 (1991)
1793	-----	20 IBIA 195 (Aug. 20, 1991)
1794	-----	20 IBLA 195 (Aug. 20, 1991)
1796	-----	20 IBIA 195 (Aug. 20, 1991)
2371	-----	119 IBLA 375 (June 28, 1991)
		121 IBLA 66 (Oct. 25, 1991)
2435	-----	121 IBLA 66 (Oct. 25, 1991)
2437	-----	118 IBLA 350 (Mar. 14, 1991)
2545	-----	119 IBLA 375 (June 28, 1991)

96 STAT.

page 2543	-----	119 IBLA 375 (June 28, 1991)
2556	-----	119 IBLA 375 (June 28, 1991)
2566	-----	119 IBLA 375 (June 28, 1991)

98 STAT.

page 1725	-----	19 IBIA 312 (Apr. 18, 1991)
1837	-----	20 IBIA 195 (Aug. 20, 1991)
1848	-----	20 IBIA 195 (Aug. 20, 1991)
2261	-----	117 IBLA 239 (Jan. 3, 1991)
2262	-----	117 IBLA 239 (Jan. 3, 1991)

100 STAT.

page 3457	-----	117 IBLA 239 (Jan. 3, 1991)
-----------	-------	-----------------------------

101 STAT.

page 200	-----	120 IBLA 279 (Aug. 30, 1991)
300	-----	119 IBLA 130 (Apr. 22, 1991)

	119	IBLA	158	(Apr. 30, 1991)
	121	IBLA	142	(Oct. 28, 1991)
1329 -----	117	IBLA	239	(Jan. 3, 1991)
1329-216 -----	117	IBLA	239	(Jan. 3, 1991)
1329-252 -----	119	IBLA	89	(Apr. 9, 1991)
1330-256 -----	118	IBLA	221, 98 I.D.	110 (1991)
	119	IBLA	7	(Mar. 15, 1991)
1330-259 -----	117	IBLA	267	(Jan. 15, 1991)
	117	IBLA	392	(Feb. 13, 1991)
	118	IBLA	214	(Mar. 7, 1991)
1719 -----	121	IBLA	328	(Dec. 13, 1991)

102 STAT.

page 72 -----	117	IBLA	239	(Jan. 3, 1991)
619 -----	117	IBLA	239	(Jan. 3, 1991)
1087 -----	119	IBLA	95	(Apr. 15, 1991)
	120	IBLA	308	(Sept. 11, 1991)
1092 -----	120	IBLA	308	(Sept. 11, 1991)
1774 -----	117	IBLA	386	(Feb. 13, 1991)
1827 -----	117	IBLA	386	(Feb. 13, 1991)
3327 -----	19	IBIA	196, 98 I.D.	14 (1991)
	20	IBIA	143	(July 17, 1991)

103 STAT.

page 701 -----	19	IBIA	279, 98 I.D.	200 (1991)
744 -----	19	IBIA	279, 98 I.D.	200 (1991)

104 STAT.

page 206 -----	19	IBIA	182	(Jan. 29, 1991)
210 -----	19	IBIA	182	(Jan. 29, 1991)
714 -----	119	IBLA	89	(Apr. 9, 1991)
714-723 -----	119	IBLA	89	(Apr. 9, 1991)
1454 -----	120	IBLA	245	(Aug. 9, 1991)
1915 -----	19	IBIA	279, 98 I.D.	200 (1991)
	120	IBLA	146	(July 16, 1991)
	120	IBLA	380	(Sept. 23, 1991)
1959 -----	19	IBIA	279, 98 I.D.	200 (1991)
1977 -----	120	IBLA	380	(Sept. 23, 1991)
4531 -----	19	IBIA	196, 98 I.D.	14 (1991)
4662 -----	19	IBIA	222	(Feb. 12, 1991)
	19	IBIA	196, 98 I.D.	14 (1991)

\* \* \* \* \*

REVISED STATUTES

page 2291	-----	121 IBLA 31 (Oct. 10, 1991)
2292	-----	121 IBLA 31 (Oct. 10, 1991)
		121 IBLA 31 (Oct. 10, 1991)
2382	-----	117 IBLA 285 (Jan. 16, 1991)
2448	-----	121 IBLA 1 (Oct. 10, 1991)
3477	-----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)
3737	-----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)



## (C) United States Codes

## TITLE 5

sec. 504	-----	IBCA-2918-F, -2919-F (Aug. 2, 1991)
		19 IBIA 318 (Apr. 18, 1991)
		119 IBLA 29 (Mar. 21, 1991)
		120 IBLA 290 (Sept. 6, 1991)
504(a)(1)	-----	IBCA-2918-F, -2919-F (Aug. 2, 1991)
		119 IBLA 29 (Mar. 21, 1991)
504(a)(2)	-----	IBCA-2918-F, -2919-F (Aug. 2, 1991)
504(b)(1)(A)	-----	IBCA-2918-F, -2919-F (Aug. 2, 1991)
504(b)(1)(C)(i)	-----	119 IBLA 29 (Mar. 21, 1991)
504(b)(1)(E)	-----	119 IBLA 29 (Mar. 21, 1991)
551(4)	-----	20 IBIA 223 (Aug. 27, 1991)
552	-----	119 IBLA 388 (July 3, 1991)
552(a)(2)	-----	19 IBIA 312 (Apr. 18, 1991)
553	-----	19 IBIA 312 (Apr. 18, 1991)
		117 IBLA 255 (Jan. 10, 1991)
		120 IBLA 245 (Aug. 9, 1991)
		9 OHA 17, 98 I.D. 164 (1991)
554	-----	IBCA-2918-F, -2919-F (Aug. 2, 1991)
		20 IBIA 50 (May 29, 1991)
		119 IBLA 29 (Mar. 21, 1991)
556(d)	-----	121 IBLA 142 (Oct. 28, 1991)
701-706	-----	120 IBLA 201 (Aug. 5, 1991)
702	-----	118 IBLA 63 (Feb. 22, 1991)
704	-----	120 IBLA 181 (July 26, 1991)
706	-----	121 IBLA 24 (Oct. 22, 1991)
706(2)(E)	-----	121 IBLA 142 (Oct. 28, 1991)

## TITLE 7

sec. 1033	-----	119 IBLA 116 (Apr. 22, 1991)
-----------	-------	------------------------------

## TITLE 9

sec. 1	<u>et seq.</u> -----	21 IBIA 45 (Nov. 12, 1991)
2	-----	21 IBIA 45 (Nov. 12, 1991)

sec. 1635 ----- 19 IBIA 184 (Feb. 5, 1991)  
3301-3432 ----- 121 IBLA 328 (Dec. 13, 1991)  
3318(b) ----- 121 IBLA 328 (Dec. 13, 1991)

sec.	251 -----	20 IBIA 143 (July 17, 1991)
	410hh-2 -----	118 IBLA 266, 98 I.D. 129 (1991)
	410hh-5 -----	118 IBLA 266, 98 I.D. 129 (1991)
	410hh-7 -----	117 IBLA 247 (Jan. 9, 1991)
		118 IBLA 204 (Mar. 6, 1991)
	460aa-460aa-9 -----	119 IBLA 53, 98 I.D. 185 (1991)
	469-469c-2 -----	118 IBLA 381 (Mar. 15, 1991)
	470f -----	118 IBLA 381 (Mar. 15, 1991)
	485 -----	120 IBLA 187 (July 29, 1991)
	520 -----	121 IBLA 174 (Oct. 31, 1991)
	544-544p -----	119 IBLA 367 (June 21, 1991)
	544g(d) -----	119 IBLA 367 (June 21, 1991)
	544g(d) (5) -----	119 IBLA 367 (June 21, 1991)
	583 -----	20 IBIA 143 (July 17, 1991)
	583-583i -----	20 IBIA 143 (July 17, 1991)
	583b -----	20 IBIA 143 (July 17, 1991)
	583f -----	20 IBIA 143 (July 17, 1991)
	670 -----	119 IBLA 332 (June 18, 1991)
	670g -----	119 IBLA 332 (June 18, 1991)
	701-718 -----	121 IBLA 347 (Dec. 17, 1991)
	703 -----	121 IBLA 347 (Dec. 17, 1991)
	703 <u>et seq.</u> -----	121 IBLA 347 (Dec. 17, 1991)
	818 -----	119 IBLA 301 (June 11, 1991)
	1006 -----	118 IBLA 83, 98 I.D. 38 (1991)
	1131 -----	119 IBLA 168 (May 1, 1991)
	1131(c) -----	119 IBLA 168 (May 1, 1991)
	1271 -----	119 IBLA 168 (May 1, 1991)
	1274(a) -----	119 IBLA 388 (July 3, 1991)
	1274(b) -----	119 IBLA 388 (July 3, 1991)
	1276(a) (13) -----	119 BILA 388 (July 3, 1991)
	1332(f) -----	118 IBLA 20 (Feb. 15, 1991)
		118 IBLA 63 (Feb. 22, 1991)
	1331-1340 -----	121 IBLA 47 (Oct. 22, 1991)
	1333 -----	118 IBLA 63 (Feb. 22, 1991)
	1333(b) -----	118 IBLA 20 (Feb. 15, 1991)
	1333(b) (1) -----	118 IBLA 20 (Feb. 15, 1991)
	1333(b) (2) -----	118 IBLA 20 (Feb. 15, 1991)
		118 IBLA 63 (Feb. 22, 1991)

## TITLE 16: Continued

sec. 1531	120 IBLA 229 (Aug. 8, 1991)
1531-1544 -----	121 IBLA 347 (Dec. 17, 1991)
1532 -----	121 IBLA 347 (Dec. 17, 1991)
1536 -----	119 IBLA 168 (May 1, 1991)
	119 IBLA 196 (May 7, 1991)
	120 IBLA 374 (Sept. 19, 1991)
	121 IBLA 347 (Dec. 17, 1991)
	122 IBLA 6 (Dec. 31, 1991)
1536(a) -----	121 IBLA 347 (Dec. 17, 1991)
1536(a)(1) -----	121 IBLA 347 (Dec. 17, 1991)
1536(a)(2) -----	119 IBLA 196 (May 7, 1991)
	121 IBLA 347 (Dec. 17, 1991)
	122 IBLA 6 (Dec. 31, 1991)
1536(a)(4) -----	121 IBLA 347 (Dec. 17, 1991)
1536(b)(1)(A) -----	122 IBLA 6 (Dec. 31, 1991)
1536(c)(1) -----	122 IBLA 6 (Dec. 31, 1991)
1536(d) -----	122 IBLA 6 (Dec. 31, 1991)
1536(h) -----	121 IBLA 347 (Dec. 17, 1991)
3120(a) -----	120 IBLA 166 (July 22, 1991)
	121 IBLA 295 (Dec. 3, 1991)
3831 -----	19 IBIA 144 (Jan. 8, 1991)
4601-6a -----	120 IBLA 374 (Sept. 19, 1991)

## TITLE 23

sec. 119 -----	119 IBLA 147 (Apr. 29, 1991)
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## TITLE 25

sec. 2 -----	19 IBIA 228 (Feb. 20, 1991)
47 -----	IBCA-2863, 98 I.D. 213 (1991)
81 -----	20 IBIA 68 (June 10, 1991)
177 -----	20 IBIA 68 (June 10, 1991)
	20 IBIA 179 (Aug. 13, 1991)
323 -----	19 IBIA 164, 98 I.D. 5 (1991)
323-328 -----	19 IBIA 228 (Feb. 20, 1991)
324 -----	19 IBIA 184 (Feb. 5, 1991)
334 -----	19 IBIA 254 (Mar. 8, 1991)
336 -----	19 IBIA 254 (Mar. 8, 1991)
348 -----	19 IBIA 228 (Feb. 20, 1991)
380 -----	19 IBIA 164, 98 I.D. 5 (1991)
393 -----	19 IBIA 164, 98 I.D. 5 (1991)
396 -----	20 IBIA 50 (May 29, 1991)
	121 IBLA 278 (Nov. 19, 1991)
396a-396f -----	19 IBIA 164, 98 I.D. 5 (1991)
	20 IBIA 131 (July 12, 1991)
	21 IBIA 88, 98 I.D. 419 (1991)
396a-396g -----	M-36970, 98 I.D. 59 (1990)

## TITLE 25: Continued

sec. 396a-396g -----	20 IBIA 50 (May 29, 1991)
	121 IBLA 278 (Nov. 19, 1991)
396b -----	M-36970, 98 I.D. 59 (1990)
396d -----	20 IBIA 50 (May 29, 1991)
	21 IBIA 88, 98 I.D. 419 (1991)
397 -----	19 IBIA 164, 98 I.D. 5 (1991)
	M-36970, 98 I.D. 59 (1990)
398 -----	19 IBIA 164, 98 I.D. 5 (1991)
398a -----	M-36970, 98 I.D. 59 (1990)
406 -----	19 IBIA 164, 98 I.D. 5 (1991)
406(a) -----	19 IBIA 164, 98 I.D. 5 (1991)
406(b) -----	19 IBIA 164, 98 I.D. 5 (1991)
406(c) -----	19 IBIA 164, 98 I.D. 5 (1991)
406(e) -----	19 IBIA 164, 98 I.D. 5 (1991)
406(f) -----	19 IBIA 164, 98 I.D. 5 (1991)
409a -----	21 IBIA 126 (Dec. 19, 1991)
410 -----	20 IBIA 168 (Aug. 13, 1991)
415 -----	19 IBIA 164, 98 I.D. 5 (1991)
	20 IBIA 179 (Aug. 13, 1991)
	21 IBIA 75 (Dec. 17, 1991)
415(a) -----	IBCA-2863, 98 I.D. 213 (1991)
416 -----	19 IBIA 164, 98 I.D. 5 (1991)
416c -----	19 IBIA 164, 98 I.D. 5 (1991)
450 -----	IBCA-2863, 98 I.D. 213 (1991)
450-450n -----	19 IBIA 279, 98 I.D. 200 (1991)
450a -----	19 IBIA 279, 98 I.D. 200 (1991)
450f(c) -----	19 IBIA 279, 98 I.D. 200 (1991)
450f(d) -----	19 IBIA 279, 98 I.D. 200 (1991)
450m -----	19 IBIA 279, 98 I.D. 200 (1991)
450m-1(d) -----	19 IBIA 279, 98 I.D. 200 (1991)
461-479 -----	19 IBIA 144 (Jan. 8, 1991)
	19 IBIA 164, 98 I.D. 5 (1991)
	19 IBIA 196, 98 I.D. 14 (1991)
	21 IBIA 24 (Oct. 22, 1991)
462 -----	19 IBIA 164, 98 I.D. 5 (1991)
464 -----	19 IBIA 164, 98 I.D. 5 (1991)
	19 IBIA 196, 98 I.D. 14 (1991)
465 -----	19 IBIA 164, 98 I.D. 5 (1991)
	19 IBIA 305 (Apr. 18, 1991)
467 -----	19 IBIA 164, 98 I.D. 5 (1991)
473 -----	19 IBIA 164, 98 I.D. 5 (1991)
476 -----	19 IBIA 164, 98 I.D. 5 (1991)
	19 IBIA 196, 98 I.D. 14 (1991)
	21 IBIA 110 (Dec. 19, 1991)
477 -----	19 IBIA 164, 98 I.D. 5 (1991)
	20 IBIA 93 (June 25, 1991)
478 -----	19 IBIA 164, 98 I.D. 5 (1991)
479 -----	19 IBIA 164, 98 I.D. 5 (1991)
483a -----	19 IBIA 144 (Jan. 8, 1991)
500-500m -----	120 IBLA 166 (July 22, 1991)

## TITLE 25: Continued

sec. 500m -----	120 IBLA 166 (July 22, 1991)
	121 IBLA 295 (Dec. 3, 1991)
501 -----	19 IBIA 164, 98 I.D. 5 (1991)
	19 IBIA 296 (Apr. 17, 1991)
501-509 -----	19 IBIA 164, 98 I.D. 5 (1991)
501-510 -----	19 IBIA 296 (Apr. 17, 1991)
504 -----	19 IBIA 164, 98 I.D. 5 (1991)
	19 IBIA 318 (Apr. 18, 1991)
552(a)(2) -----	19 IBIA 312 (Apr. 18, 1991)
553 -----	19 IBIA 312 (Apr. 18, 1991)
640-26(b) -----	121 IBLA 197, 98 I.D. 398
	(1991)
640d-640d-28 -----	20 IBIA 255 (Sept. 23, 1991)
640d-7 -----	20 IBIA 248 (Sept. 20, 1991)
	20 IBIA 255 (Sept. 23, 1991)
640d-10(a) -----	121 IBLA 197, 98 I.D. 398
	(1991)
640d-13 -----	20 IBIA 248 (Sept. 20, 1991)
640d-13(a) -----	20 IBIA 255 (Sept. 23, 1991)
640d-18 -----	20 IBIA 255 (Sept. 23, 1991)
640d <u>et seq.</u> -----	20 IBIA 248 (Sept. 20, 1991)
	20 IBIA 255 (Sept. 23, 1991)
1300i -----	19 IBIA 182 (Jan. 29, 1991)
1301-1341 -----	19 IBIA 279, 98 I.D. 200 (1991)
1451-1453 -----	20 IBIA 158 (Aug. 5, 1991)
1451-1543 -----	20 IBIA 217 (Aug. 27, 1991)
1451 <u>et seq.</u> -----	20 IBIA 158 (Aug. 5, 1991)
1452 -----	20 IBIA 158 (Aug. 5, 1991)
1452(b) -----	20 IBIA 158 (Aug. 5, 1991)
1452(e) -----	20 IBIA 158 (Aug. 5, 1991)
1461-1469 -----	20 IBIA 190 (Aug. 16, 1991)
	20 IBIA 219 (Aug. 27, 1991)
1463 -----	20 IBIA 176 (Aug. 13, 1991)
	20 IBIA 190 (Aug. 16, 1991)
	20 IBIA 219 (Aug. 27, 1991)
1466 -----	21 IBIA 53 (Nov. 13, 1991)
1481-1498 -----	20 IBIA 158 (Aug. 5, 1991)
1521 -----	20 IBIA 183 (Aug. 13, 1991)
	21 IBIA 7 (Oct. 8, 1991)
1521-1524 -----	20 IBIA 183 (Aug. 13, 1991)
	21 IBIA 7 (Oct. 8, 1991)
1522(a) -----	19 IBIA 312 (Apr. 18, 1991)
1725(b)(2) -----	20 IBIA 195 (Aug. 20, 1991)
1725(i) -----	20 IBIA 195 (Aug. 20, 1991)
1728(b) -----	20 IBIA 195 (Aug. 20, 1991)
1761(a)(6) -----	121 IBLA 197, 98 I.D. 398
	(1991)
2001(k) -----	20 IBIA 242 (Sept. 9, 1991)
2201-2211 -----	19 IBIA 144 (Jan. 8, 1991)
2201(4) -----	19 IBIA 164, 98 I.D. 5 (1991)

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TITLE 25: Continued

sec. 2205	-----	19	IBIA 196, 98 I.D. 14 (1991)
2206	-----	19	IBIA 222 (Feb. 12, 1991)
		19	IBIA 196, 98 I.D. 14 (1991)
2206(a)	-----	19	IBIA 196, 98 I.D. 14 (1991)
2209	-----	19	IBIA 164, 98 I.D. 5 (1991)
2503	-----	19	IBIA 243 (Feb. 26, 1991)
2503(g)	-----	19	IBIA 243 (Feb. 26, 1991)
2508(b)	-----	19	IBIA 243 (Feb. 26, 1991)

TITLE 26

sec. 6335	-----	120	IBLA 308 (Sept. 11, 1991)
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TITLE 28

sec. 2412	-----	19	IBIA 318 (Apr. 18, 1991)
2412(d) (1) (B)	-----	19	IBIA 318 (Apr. 18, 1991)
2415	-----	20	IBIA 168 (Aug. 13, 1991)
		117	IBLA 303 (Jan. 17, 1991)
		119	IBLA 76, 98 I.D. 207 (1991)
		119	IBLA 345 (June 18, 1991)
2415(a)	-----	119	IBLA 345 (June 18, 1991)
2514	-----		IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
2671-2680	-----	19	IBIA 279, 98 I.D. 200 (1991)
		19	IBIA 318 (Apr. 18, 1991)

TITLE 29

sec. 151	<u>et seq.</u> -----	20	IBIA 118 (July 11, 1991)
651	<u>et seq.</u> -----	19	IBIA 279, 98 I.D. 200 (1991)

TITLE 30

sec. 21	-----	120	IBLA 63 (July 15, 1991)
22	<u>et seq.</u> -----	117	IBLA 386 (Feb. 13, 1991)
23	-----	118	IBLA 266, 98 I.D. 129 (1991)
26	-----	119	IBLA 370 (June 26, 1991)
27	-----	119	IBLA 53, 98 I.D. 185 (1991)
28	-----	119	IBLA 383 (July 3, 1991)
		120	IBLA 395 (Oct. 3, 1991)
		121	IBLA 309 (Dec. 3, 1991)
28b	-----	117	IBLA 377 (Feb. 12, 1991)
		119	IBLA 383 (July 3, 1991)
		120	IBLA 395 (Oct. 3, 1991)

## TITLE 30: Continued

sec.	28b	121 IBLA 309 (Dec. 3, 1991)
	28b-28e -----	117 IBLA 377 (Feb. 12, 1991)
		119 IBLA 252 (May 16, 1991)
	28e -----	117 IBLA 377 (Feb. 12, 1991)
	35 -----	120 IBLA 63 (July 15, 1991)
	36 -----	120 IBLA 63 (July 15, 1991)
	38 -----	119 IBLA 319 (June 18, 1991)
	42(b) -----	121 IBLA 260 (Nov. 15, 1991)
	121 -----	119 IBLA 125 (Apr. 22, 1991)
	124 -----	119 IBLA 125 (Apr. 22, 1991)
	181 -----	120 IBLA 201 (Aug. 5, 1991)
		120 IBLA 271 (Aug. 22, 1991)
		121 IBLA 188 (Nov. 7, 1991)
	181-263 -----	120 IBLA 374 (Sept. 19, 1991)
	181-287 -----	121 IBLA 328 (Dec. 13, 1991)
		121 IBLA 339 (Dec. 13, 1991)
		121 IBLA 373, 98 I.D. 429 (1991)
	184(h)(2) -----	118 IBLA 372 (Mar. 14, 1991)
	185(r) -----	120 IBLA 290 (Sept. 6, 1991)
	187 -----	119 IBLA 272 (May 30, 1991)
		119 IBLA 338 (June 18, 1991)
		121 IBLA 291 (Nov. 25, 1991)
	187(a) -----	119 IBLA 338 (June 18, 1991)
		120 IBLA 177 (July 26, 1991)
	188(a) -----	121 IBLA 397 (Dec. 26, 1991)
	188(b) -----	117 IBLA 267 (Jan. 15, 1991)
		117 IBLA 271 (Jan. 15, 1991)
		118 IBLA 372 (Mar. 14, 1991)
		120 IBLA 163 (July 18, 1991)
		120 IBLA 193 (July 30, 1991)
		120 IBLA 391 (Sept. 30, 1991)
	188(b)(1)(A) -----	120 IBLA 271 (Aug. 22, 1991)
	188(c) -----	120 IBLA 163 (July 18, 1991)
		120 IBLA 391 (Sept. 30, 1991)
	189 -----	118 IBLA 338 (Mar. 12, 1991)
		121 IBLA 397 (Dec. 26, 1991)
	191 -----	117 IBLA 316 (Jan. 14, 1991)
		122 IBLA 1 (Dec. 26, 1991)
	193 -----	121 IBLA 339 (Dec. 13, 1991)
	207 -----	117 IBLA 271 (Jan. 15, 1991)
		118 IBLA 364 (Mar. 14, 1991)
	207(a) -----	117 IBLA 271 (Jan. 15, 1991)
		118 IBLA 364 (Mar. 14, 1991)
		121 IBLA 314 (Dec. 4, 1991)
		121 IBLA 373, 98 I.D. 429 (1991)
	207(b) -----	117 IBLA 271 (Jan. 15, 1991)
		121 IBLA 314 (Dec. 4, 1991)
	207(c) -----	118 IBLA 181, 98 I.D. 97 (1991)

## TITLE 30: Continued

sec. 209 -----	117 IBLA 316 (Jan. 24, 1991)
	118 IBLA 181, 98 I.D. 97 (1991)
	119 IBLA 210 (May 8, 1991)
	119 IBLA 231 (May 14, 1991)
	119 IBLA 359 (June 21, 1991)
	120 IBLA 47 (July, 12, 1991)
	121 IBLA 373, 98 I.D. 429 (1991)
226 -----	119 IBLA 45 (Mar. 25, 1991)
	120 IBLA 47 (July 12, 1991)
226(a) -----	M-36970, 98 I.D. 59 (1990)
226(b) -----	117 IBLA 392 (Feb. 13, 1991)
	119 IBLA 7 (Mar. 15, 1991)
	121 IBLA 188 (Nov. 7, 1991)
226(b) (1) (A) -----	117 IBLA 390 (Feb. 13, 1991)
226(c) -----	118 IBLA 221, 98 I.D. 110 (1991)
	119 IBLA 178 (May 7, 1991)
	121 IBLA 188 (Nov. 7, 1991)
226(f) -----	21 IBIA 88, 98 I.D. 419 (1991)
	119 IBLA 73 (Apr. 5, 1991)
	119 IBLA 210 (May 8, 1991)
226(h) -----	118 IBLA 214 (Mar. 7, 1991)
226(j) -----	21 IBIA 88, 98 I.D. 419 (1991)
	118 IBLA 8 (Feb. 14, 1991)
226(m) -----	120 IBLA 47 (July 12, 1991)
	120 IBLA 229 (Aug. 8, 1991)
226-2 -----	9 OHA 68, 98 I.D. 248 (1991)
352 -----	117 IBLA 392 (Feb. 13, 1991)
	119 IBLA 178 (May 7, 1991)
	120 IBLA 245 (Aug. 9, 1991)
354 -----	117 IBLA 392 (Feb. 13, 1991)
359 -----	118 IBLA 338 (Mar. 12, 1991)
525 -----	121 IBLA 339 (Dec. 13, 1991)
601 -----	119 IBLA 367 (June 21, 1991)
	120 IBLA 76A (July 15, 1991)
601-615 -----	119 IBLA 367 (June 21, 1991)
611 -----	119 IBLA 319 (June 18, 1991)
	120 IBLA 63 (July 15, 1991)
612 -----	119 IBLA 367 (June 21, 1991)
612(a) -----	120 IBLA 274 (Aug. 28, 1991)
613 -----	119 IBLA 12 (Mar. 18, 1991)
1001-1025 -----	119 IBLA 116 (Apr. 22, 1991)
1004(c) -----	119 IBLA 116 (Apr. 22, 1991)
1201 -----	118 IBLA 129, 98 I.D. 70 (1991)
1201-1328 -----	119 IBLA 219 (May 14, 1991)
	120 IBLA 279 (Aug. 30, 1991)
1201(c) -----	118 IBLA 129, 98 I.D. 70 (1991)
1202 -----	118 IBLA 83, 98 I.D. 38 (1991)
1202(b) -----	120 IBLA 1, 98 I.D. 231 (1991)

## TITLE 30: Continued

sec. 1252 -----	119	IBLA 158 (Apr. 30, 1991)
1253 -----	119	IBLA 158 (Apr. 30, 1991)
	119	IBLA 296 (June 11, 1991)
	121	IBLA 142 (Oct. 28, 1991)
1253(a) -----	119	IBLA 158 (Apr. 30, 1991)
1253(a)(4) -----	120	IBLA 1, 98 I.D. 231 (1991)
1254 -----	119	IBLA 158 (Apr. 30, 1991)
	121	IBLA 142 (Oct. 28, 1991)
1254(b) -----	119	IBLA 158 (Apr. 30, 1991)
1256(a) -----	119	IBLA 158 (Apr. 30, 1991)
1257(b)(9) -----	120	IBLA 1, 98 I.D. 231 (1991)
1259(a) -----	119	IBLA 296 (June 11, 1991)
1265(b) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(b)(3) -----	118	IBLA 83, 98 I.D. 38 (1991)
	119	IBLA 219 (May 14, 1991)
	121	IBLA 142 (Oct. 28, 1991)
1265(b)(8) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(b)(8)(A)-(F) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(b)(8)(E) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(b)(22) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(b)(22)(G) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(b)(28) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(c) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(d)(2) -----	118	IBLA 83, 98 I.D. 38 (1991)
1265(e)(1) -----	118	IBLA 83, 98 I.D. 38 (1991)
1266(b)(10) -----	118	IBLA 129, 98 I.D. 70 (1991)
1268(a) -----	117	IBLA 350 (Jan. 31, 1991)
	118	IBLA 14 (Feb. 14, 1991)
1269(c) -----	117	IBLA 380 (Feb. 13, 1991)
1269(c)(2) -----	117	IBLA 380 (Feb. 13, 1991)
1270(f) -----	120	IBLA 1, 98 I.D. 231 (1991)
1271 -----	117	IBLA 350 (Jan. 31, 1991)
	119	IBLA 158 (Apr. 30, 1991)
	119	IBLA 296 (June 11, 1991)
	121	IBLA 142 (Oct. 28, 1991)
1271(a) -----	119	IBLA 83 (Apr. 9, 1991)
	119	IBLA 130 (Apr. 22, 1991)
	119	IBLA 158 (Apr. 30, 1991)
	120	IBLA 1, 98 I.D. 231 (1991)
1271(a)(1) -----	119	IBLA 219 (May 14, 1991)
	120	IBLA 1, 98 I.D. 231 (1991)
	121	IBLA 142 (Oct. 28, 1991)
1271(a)(2) -----	121	IBLA 142 (Oct. 28, 1991)
1271(a)(3) -----	117	IBLA 350 (Jan. 31, 1991)
1271(e)(5) -----	118	IBLA 129, 98 I.D. 70 (1991)
1272(e) -----	118	IBLA 129, 98 I.D. 70 (1991)
1272(e)(4) -----	118	IBLA 129, 98 I.D. 70 (1991)
1276(c) -----	119	IBLA 158 (Apr. 30, 1991)
1278(2) -----	119	IBLA 130 (Apr. 22, 1991)
	119	IBLA 158 (Apr. 30, 1991)

## TITLE 30: Continued

sec. 1278(2) -----	120 IBLA 279 (Aug. 30, 1991)
1291(2) -----	118 IBLA 83, 98 I.D. 38 (1991)
	119 IBLA 219 (May 14, 1991)
1291(28) -----	118 IBLA 129, 98 I.D. 70 (1991)
1291(28)(A) -----	118 IBLA 129, 98 I.D. 70 (1991)
	119 IBLA 83 (Apr. 9, 1991)
1291(28)(B) -----	118 IBLA 129, 98 I.D. 70 (1991)
1701-1751 -----	119 IBLA 76, 98 I.D. 207 (1991)
1701-1757 -----	21 IBIA 88, 98 I.D. 419 (1991)
1702(7) -----	121 IBLA 278 (Nov. 19, 1991)
1711(c) -----	121 IBLA 328 (Dec. 13, 1991)
1713(b) -----	119 IBLA 345 (June 18, 1991)
1719 -----	117 IBLA 255 (Jan. 10, 1991)
	118 IBLA 338 (Mar. 12, 1991)
	121 IBLA 1, 98 I.D. 267 (1991)
1721(a) -----	121 IBLA 270 (Nov. 18, 1991)
	121 IBLA 278 (Nov. 19, 1991)
	122 IBLA 1 (Dec. 26, 1991)
1735 -----	119 IBLA 345 (June 18, 1991)
	121 IBLA 188 (Nov. 7, 1991)
	121 IBLA 328 (Dec. 13, 1991)
1753(a) -----	118 IBLA 338 (Mar. 12, 1991)
	121 IBLA 328 (Dec. 13, 1991)
1735(b) -----	121 IBLA 328 (Dec. 13, 1991)
1735(b)(3) -----	121 IBLA 328 (Dec. 13, 1991)
1755 -----	119 IBLA 345 (June 18, 1991)

## TITLE 31

sec. 203 -----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)
3127 -----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)
3711(a)(3) -----	20 IBIA 168 (Aug. 13, 1991)
3711(c)(1) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
3727 -----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)
3729-3731 -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
3729-3733 -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
3729(a) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
3730(a) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)

## TITLE 41

sec. 15 -----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)
601 -----	IBCA-2863, 98 I.D. 213 (1991) IBCA-2885-89, 98 I.D. 253 (1991) IBCA-2953, 98 I.D. 355 (1991)
601-613 -----	19 IBIA 279, 98 I.D. 200 (1991)
601 <u>et seq.</u> -----	IBCA-2885-89, 98 I.D. 210 (1991)
601(1) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
601(5) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
601(a)(1) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
601(d) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
602(a)(7)(A) -----	20 IBIA 195 (Aug. 20, 1991)
604 -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
605(a) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991) IBCA-2863, 98 I.D. 213 (1991) IBCA-2885-89, 98 I.D. 253 (1991) IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)
605(b) -----	IBCA-2885-89, 98 I.D. 253 (1991)
605(c)(1) -----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991) IBCA-2953, 98 I.D. 355 (1991)
605(c)(5) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
606 -----	IBCA-2777 <u>et al.</u> , 98 I.D. 281 (1991)
607 -----	IBCA-2863, 98 I.D. 213 (1991)
607(d) -----	IBCA-2863, 98 I.D. 213 (1991)
607(e) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
607(g)(1) -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)
607(g)(1)(A) -----	IBCA-2918-F, -2919-F (Aug. 2, 1991)
611 -----	IBCA-2319 <u>et al.</u> , 98 I.D. 23 (1991)

## TITLE 42

sec. 612 -----	20 IBIA 195 (Aug. 20, 1991)
4321 -----	118 IBLA 381 (Mar. 15, 1991)
	119 IBLA 196 (May 7, 1991)
	120 IBLA 229 (Aug. 8, 1991)
4321-4370 -----	121 IBLA 347 (Dec. 17, 1991)
4332 -----	119 IBLA 168 (May 1, 1991)
4332-4361 -----	118 IBLA 354 (Mar. 14, 1991)
4332(2)(C) -----	120 IBLA 34 (July 11, 1991)
	120 IBLA 47 (July 12, 1991)
	120 IBLA 290 (Sept. 6, 1991)
	121 IBLA 347 (Dec. 17, 1991)
4332(2)(E) -----	120 IBLA 47 (July 12, 1991)
4332(C) -----	122 IBLA 6 (Dec. 31, 1991)
4601(10) -----	9 OHA 99 (Oct. 31, 1991)
4622(a) -----	9 OHA 59 (May 3, 1991)
4622(a)(1) -----	9 OHA 8 (Feb. 28, 1991)
4623 -----	9 OHA 99 (Oct. 31, 1991)
4623(a)(1) -----	9 OHA 8 (Feb. 28, 1991)
4651 -----	9 OHA 99 (Oct. 31, 1991)
4653 -----	9 OHA 15 (Mar. 21, 1991)
4654(a) -----	9 OHA 15 (Mar. 21, 1991)

## TITLE 43

sec. 141 -----	121 IBLA 339 (Dec. 13, 1991)
142 -----	121 IBLA 339 (Dec. 13, 1991)
155-158 -----	117 IBLA 239 (Jan. 3, 1991)
156 -----	117 IBLA 239 (Jan. 3, 1991)
161 -----	119 IBLA 125 (Apr. 22, 1991)
164 -----	121 IBLA 31 (Oct. 10, 1991)
171 -----	121 IBLA 31 (Oct. 10, 1991)
270-1 -----	117 IBLA 247 (Jan. 9, 1991)
	118 IBLA 1 (Feb. 13, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	121 IBLA 224 (Nov. 13, 1991)
270-1-270-3 -----	117 IBLA 247 (Jan. 9, 1991)
	117 IBLA 330 (Jan. 24, 1991)
	117 IBLA 358 (Jan. 31, 1991)
	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	119 IBLA 260 (May 22, 1991)
	120 IBLA 367 (Sept. 18, 1991)
	121 IBLA 52 (Oct. 23, 1991)
	121 IBLA 155 (Oct. 31, 1991)
	121 IBLA 363 (Dec. 19, 1991)
270-3 -----	117 IBLA 247 (Jan. 9, 1991)
	117 IBLA 358 (Jan. 31, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	121 IBLA 224 (Nov. 13, 1991)

## TITLE 43: Continued

sec. 315 -----	119 IBLA 202 (May 7, 1991)
315a-315r -----	119 IBLA 202 (May 7, 1991)
315b -----	119 IBLA 202 (May 7, 1991)
	120 IBLA 374 (Sept. 19, 1991)
315f -----	117 IBLA 239 (Jan. 3, 1991)
315h -----	118 IBLA 345 (Mar. 13, 1991)
	120 IBLA 342 (Sept. 12, 1991)
321 -----	120 IBLA 153 (July 16, 1991)
	121 IBLA 218 (Nov. 13, 1991)
321-329 -----	121 IBLA 218 (Nov. 13, 1991)
322 -----	121 IBLA 218 (Nov. 13, 1991)
328 -----	120 IBLA 153 (July 16, 1991)
	121 IBLA 218 (Nov. 18, 1991)
329 -----	120 IBLA 153 (July 16, 1991)
	121 IBLA 218 (Nov. 13, 1991)
333 -----	120 IBLA 153 (July 16, 1991)
	121 IBLA 218 (Nov. 13, 1991)
334 -----	120 IBLA 153 (July 16, 1991)
670g -----	119 IBLA 332 (June 18, 1991)
670h -----	119 IBLA 332 (June 18, 1991)
682(a) -----	119 IBLA 122 (Apr. 22, 1991)
	119 IBLA 319 (June 18, 1991)
722 -----	119 IBLA 141 (Apr. 25, 1991)
732 -----	117 IBLA 285 (Jan. 16, 1991)
735 -----	117 IBLA 285 (Jan. 16, 1991)
852(a)(3) -----	119 IBLA 116 (Apr. 22, 1991)
869 -----	119 IBLA 33 (Mar. 25, 1991)
	119 IBLA 375 (June 28, 1991)
869-869-4 -----	119 IBLA 136 (Apr. 23, 1991)
	121 IBLA 321 (Dec. 10, 1991)
869-1 -----	119 IBLA 136 (Apr. 23, 1991)
869-2 -----	119 IBLA 33 (Mar. 25, 1991)
869-2(b) -----	119 IBLA 33 (Mar. 25, 1991)
869-2(b)(1) -----	119 IBLA 33 (Mar. 25, 1991)
870 -----	119 IBLA 141 (Apr. 25, 1991)
898 -----	118 IBLA 78 (Feb. 27, 1991)
956 -----	117 IBLA 281 (Jan. 16, 1991)
982-994 -----	121 IBLA 73, 98 I.D. 321 (1991)
1068 -----	117 IBLA 339 (Jan. 29, 1991)
	119 IBLA 70 (Apr. 1, 1991)
	121 IBLA 386 (Dec. 26, 1991)
	121 IBLA 73, 98 I.D. 321 (1991)
1068(a) -----	121 IBLA 386 (Dec. 26, 1991)
1152 -----	121 IBLA 31 (Oct. 10, 1991)
1166 -----	121 IBLA 31 (Oct. 10, 1991)
1181a -----	121 IBLA 347 (Dec. 17, 1991)
1181a-1181f -----	120 IBLA 374 (Sept. 19, 1991)
	121 IBLA 347 (Dec. 17, 1991)
1205(b) -----	120 IBLA 324 (Sept. 12, 1991)
1211 -----	120 IBLA 63 (July 15, 1991)

## TITLE 43: Continued

sec. 1221 -----	117 IBLA 339 (Jan. 29, 1991)
	119 IBLA 70 (Apr. 1, 1991)
1331-1356 -----	118 IBLA 30 (Feb. 21, 1991)
1334(a) -----	118 IBLA 338 (Mar. 12, 1991)
1335 -----	118 IBLA 30 (Feb. 21, 1991)
1335(b) -----	118 IBLA 30 (Feb. 21, 1991)
1337 -----	118 IBLA 30 (Feb. 21, 1991)
1339 -----	9 OHA 68, 98 I.D. 248 (1991)
	121 IBLA 270 (Nov. 18, 1991)
1344(a)(4) -----	117 IBLA 255 (Jan. 10, 1991)
1452 -----	120 IBLA 245 (Aug. 9, 1991)
1601 -----	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 60 (Feb. 21, 1991)
	119 IBLA 301 (June 11, 1991)
1601 <u>et seq.</u> -----	120 IBLA 324 (Sept. 12, 1991)
1602(m) -----	118 IBLA 334 (Mar. 12, 1991)
1610(a)(1) -----	117 IBLA 247 (Jan. 9, 1991)
1611 -----	118 IBLA 334 (Mar. 12, 1991)
	119 IBLA 301 (June 11, 1991)
	119 IBLA 375 (June 28, 1991)
1613(a) -----	119 IBLA 260 (May 22, 1991)
1613(c)(1) -----	118 IBLA 334 (Mar. 12, 1991)
1613(c)(2) -----	118 IBLA 334 (Mar. 12, 1991)
1613(e) -----	118 IBLA 60 (Feb. 21, 1991)
1613(f) -----	119 IBLA 260 (May 22, 1991)
1613(g) -----	121 IBLA 197, 98 I.D. 398 (1991)
1616(b) -----	118 IBLA 1 (Feb. 13, 1991)
1616(d)(1) -----	118 IBLA 266, 98 I.D. 129 (1991)
1616(d)(2)(A) -----	118 IBLA 266, 98 I.D. 129 (1991)
1617 -----	117 IBLA 330 (Jan. 24, 1991)
	117 IBLA 358 (Jan. 31, 1991)
	120 IBLA 367 (Sept. 18, 1991)
	121 IBLA 66 (Oct. 25, 1991)
1617(a) -----	117 IBLA 247 (Jan. 9, 1991)
	117 IBLA 330 (Jan. 24, 1991)
	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 1 (Feb. 13, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	119 IBLA 260 (May 22, 1991)
	121 IBLA 52 (Oct. 23, 1991)
	121 IBLA 155 (Oct. 31, 1991)
	121 IBLA 224 (Nov. 13, 1991)
	121 IBLA 363 (Dec. 19, 1991)
1621(j) -----	119 IBLA 260 (May 22, 1991)
1634 -----	117 IBLA 373 (Feb. 7, 1991)
	118 IBLA 204 (Mar. 6, 1991)
	121 IBLA 52 (Oct. 23, 1991)

## TITLE 43: Continued

sec. 1634(a) -----	119	IBLA	260	(May 22, 1991)
	121	IBLA	66	(Oct. 25, 1991)
	121	IBLA	224	(Nov. 13, 1991)
1634(a)(1) -----	118	IBLA	334	(Mar. 12, 1991)
	121	IBLA	363	(Dec. 19, 1991)
1634(a)(2) -----	120	IBLA	367	(Sept. 18, 1991)
1634(a)(4) -----	117	IBLA	247	(Jan. 9, 1991)
	117	IBLA	358	(Jan. 31, 1991)
	118	IBLA	204	(Mar. 6, 1991)
	121	IBLA	52	(Oct. 23, 1991)
	121	IBLA	363	(Dec. 19, 1991)
1634(a)(5) -----	117	IBLA	373	(Feb. 7, 1991)
	118	IBLA	334	(Mar. 12, 1991)
	119	IBLA	260	(May 22, 1991)
1634(a)(5)(A) -----	118	IBLA	334	(Mar. 12, 1991)
1634(a)(5)(B) -----	118	IBLA	1	(Feb. 13, 1991)
	119	IBLA	260	(May 22, 1991)
	121	IBLA	363	(Dec. 19, 1991)
1634(a)(5)(C) -----	121	IBLA	155	(Oct. 31, 1991)
1634(a)(6) -----	121	IBLA	66	(Oct. 25, 1991)
1634(c) -----	117	IBLA	330	(Jan. 24, 1991)
	119	IBLA	260	(May 22, 1991)
1635(c)(1) -----	117	IBLA	330	(Jan. 24, 1991)
1635(f)(2) -----	118	IBLA	350	(Mar. 14, 1991)
1643(a) -----	120	IBLA	367	(Sept. 18, 1991)
1701 -----	118	IBLA	60	(Feb. 21, 1991)
1701-1784 -----	119	IBLA	388	(July 3, 1991)
1701(a)(4) -----	117	IBLA	239	(Jan. 3, 1991)
1701(a)(9) -----	120	IBLA	216	(Aug. 5, 1991)
	9	OHA	108	(Nov. 12, 1991)
1702(c) -----	119	IBLA	202	(May 7, 1991)
1702(e) -----	118	IBLA	60	(Feb. 21, 1991)
1702(j) -----	117	IBLA	239	(Jan. 3, 1991)
1711 -----	119	IBLA	168	(May 1, 1991)
1712 -----	119	IBLA	33	(Mar. 25, 1991)
	120	IBLA	153	(July 16, 1991)
1713 -----	117	IBLA	339	(Jan. 29, 1991)
1713(a) -----	119	IBLA	33	(Mar. 25, 1991)
1713(a)(3) -----	119	IBLA	33	(Mar. 25, 1991)
1713(d) -----	119	IBLA	33	(Mar. 25, 1991)
	121	IBLA	386	(Dec. 26, 1991)
1714 -----	117	IBLA	239	(Jan. 3, 1991)
	118	IBLA	60	(Feb. 21, 1991)
	119	IBLA	152	(Apr. 29, 1991)
1714(a) -----	117	IBLA	285	(Jan. 16, 1991)
1714(b) -----	117	IBLA	239	(Jan. 3, 1991)
1714(j) -----	117	IBLA	239	(Jan. 3, 1991)
1716 -----	119	IBLA	95	(Apr. 15, 1991)
	120	IBLA	187	(July 29, 1991)
	120	IBLA	347	(Sept. 13, 1991)

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TITLE 43: Continued

sec. 1716(a) -----	119 IBLA 95 (Apr. 15, 1991)
	120 IBLA 308 (Sept. 11, 1991)
1716(b) -----	119 IBLA 95 (Apr. 15, 1991)
	120 IBLA 308 (Sept. 11, 1991)
1716(f)(1) -----	119 IBLA 95 (Apr. 15, 1991)
1716(g) -----	119 IBLA 95 (Apr. 15, 1991)
	120 IBLA 308 (Sept. 11, 1991)
1716(i) -----	120 IBLA 308 (Sept. 11, 1991)
1719 -----	119 IBLA 116 (Apr. 22, 1991)
	119 IBLA 389 (June 6, 1991)
1719(a) -----	119 IBLA 33 (Mar. 25, 1991)
1719(b) -----	119 IBLA 33 (Mar. 25, 1991)
	119 IBLA 116 (Apr. 22, 1991)
1732 -----	118 IBLA 259 (Mar. 11, 1991)
	119 IBLA 355 (June 18, 1991)
	121 IBLA 347 (Dec. 17, 1991)
	121 IBLA 386 (Dec. 26, 1991)
1732(a) -----	121 IBLA 347 (Dec. 17, 1991)
1732(b) -----	118 IBLA 259 (Mar. 11, 1991)
	118 IBLA 381 (Mar. 15, 1991)
	119 IBLA 196 (May 7, 1991)
	119 IBLA 370 (June 26, 1991)
	120 IBLA 34 (July 11, 1991)
	120 IBLA 216 (Aug. 5, 1991)
	121 IBLA 386 (Dec. 26, 1991)
1732(c) -----	120 IBLA 374 (Sept. 19, 1991)
1733(a) -----	120 IBLA 374 (Sept. 19, 1991)
1740 -----	119 IBLA 355 (June 18, 1991)
1744 -----	117 IBLA 377 (Feb. 12, 1991)
	118 IBLA 210 (Mar. 7, 1991)
	119 IBLA 25 (Mar. 19, 1991)
	119 IBLA 141 (Apr. 25, 1991)
	119 IBLA 252 (May 16, 1991)
	119 IBLA 319 (June 18, 1991)
	119 IBLA 370 (June 26, 1991)
	119 IBLA 383 (July 3, 1991)
1744(a) -----	118 IBLA 266, 98 I.D. 129 (1991)
	121 IBLA 309 (Dec. 3, 1991)
	121 IBLA 370 (Dec. 19, 1991)
1744(b) -----	117 IBLA 239 (Jan. 3, 1991)
	121 IBLA 339 (Dec. 13, 1991)
	121 IBLA 370 (Dec. 19, 1991)
1744(c) -----	117 IBLA 239 (Jan. 3, 1991)
	118 IBLA 210 (Mar. 7, 1991)
	119 IBLA 25 (Mar. 19, 1991)
	119 IBLA 370 (June 26, 1991)
	119 IBLA 383 (July 3, 1991)
	121 IBLA 309 (Dec. 3, 1991)
	121 IBLA 370 (Dec. 19, 1991)

## TITLE 43: Continued

sec. 1746 -----	121 IBLA 73, 98 I.D. 321 (1991)
1751-1753 -----	119 IBLA 202 (May 7, 1991)
1761 -----	117 IBLA 281 (Jan. 16, 1991)
1761(a)(6) -----	121 IBLA 138 (Oct. 28, 1991)
1761-1771 -----	119 IBLA 241 (May 15, 1991)
	119 IBLA 281 (June 6, 1991)
	120 IBLA 146 (July 16, 1991)
	120 IBLA 172 (July 23, 1991)
	120 IBLA 240 (Aug. 9, 1991)
	120 IBLA 290 (Sept. 6, 1991)
	120 IBLA 374 (Sept. 19, 1991)
	121 IBLA 61 (Oct. 25, 1991)
	121 IBLA 302 (Dec. 3, 1991)
	121 IBLA 197, 98 I.D. 398 (1991)
1761(a) -----	119 IBLA 277 (June 6, 1991)
1761(a)(1) -----	119 IBLA 122 (Apr. 22, 1991)
	119 IBLA 281 (June 6, 1991)
1761(a)(7) -----	121 IBLA 197, 98 I.D. 398 (1991)
1761(b)(1) -----	120 IBLA 290 (Sept. 6, 1991)
	120 IBLA 347 (Sept. 13, 1991)
1763 -----	120 IBLA 290 (Sept. 6, 1991)
1764(b) -----	120 IBLA 347 (Sept. 13, 1991)
1764(g) -----	119 IBLA 65 (Mar. 29, 1991)
	119 IBLA 122 (Apr. 22, 1991)
	119 IBLA 257 (May 16, 1991)
	119 IBLA 281 (June 6, 1991)
	120 IBLA 146 (July 16, 1991)
	120 IBLA 172 (July 23, 1991)
	120 IBLA 240 (Aug. 9, 1991)
	120 IBLA 266 (Aug. 21, 1991)
	121 IBLA 386 (Dec. 26, 1991)
	121 IBLA 302 (Dec. 3, 1991)
1764(i) -----	121 IBLA 61 (Oct. 25, 1991)
1765 -----	120 IBLA 290 (Sept. 6, 1991)
1766 -----	121 IBLA 61 (Oct. 25, 1991)
	121 IBLA 197, 98 I.D. 398 (1991)
1768 -----	121 IBLA 185 (Nov. 5, 1991)
	121 IBLA 197, 98 I.D. 398 (1991)
1782 -----	118 IBLA 381 (Mar. 15, 1991)
	119 IBLA 168 (May 1, 1991)
1782(a) -----	119 IBLA 168 (May 1, 1991)
1782(b) -----	119 IBLA 168 (May 1, 1991)
1782(c) -----	117 IBLA 274 (Jan. 16, 1991)
	119 IBLA 310 (June 11, 1991)
4321-4361 -----	120 IBLA 347 (Sept. 13, 1991)
4332(2)(C) -----	120 IBLA 347 (Sept. 13, 1991)

## TITLE 45

sec. 1201 et seq. ----- 120 IBLA 324 (Sept. 12, 1991)  
 1203(b)(1)(B) ----- 120 IBLA 324 (Sept. 12, 1991)  
 1205(b)(4)(A)(i) ----- 120 IBLA 324 (Sept. 12, 1991)

## TITLE 49

sec. 1(1) ----- 120 IBLA 290 (Sept. 6, 1991)  
 1(4) ----- 120 IBLA 290 (Sept. 6, 1991)  
 65(b) ----- 118 IBLA 78 (Feb. 27, 1991)  
 211-214 ----- 121 IBLA 155 (Oct. 31, 1991)  
 10102(19) ----- 120 IBLA 290 (Sept. 6, 1991)  
 10501(a) ----- 120 IBLA 290 (Sept. 6, 1991)  
 11101(a) ----- 120 IBLA 290 (Sept. 6, 1991)

#### ACCOUNTS

(See also Fees, Funds, Payments)

#### FEES AND COMMISSIONS

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309  
(Jan. 23, 1991)

#### REFUNDS

Because BLM had no authority to accept rental payment for land within a geothermal lease over which it had no jurisdiction, it was obliged to refund to the lessee any excess payment.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

#### ACCRETION

(See also Boundaries, Public Lands)

In apportioning accreted lands between two adjoining riparian sections, BLM properly uses the perpendicular survey method where it is not feasible to use the proportionate shoreline survey method because no zero accretion point or end point of a perpendicular line drawn to the new bank of the river created by accretion may be used to allocate proportionate parts of that bank to the sections.

In utilizing the perpendicular survey method to apportion accreted lands between two adjoining riparian sections, BLM must select a perpendicular line drawn to the new bank of the river created by accretion which equitably apportions that bank between the sections,

ACCRETION--Continued

consistent, whenever practicable, with awarding to each section the land in front of it.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor),  
9 OHA 17 (Mar. 26, 1991) 98 I.D. 164

ACT OF JUNE 25, 1910

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

ACT OF JULY 17, 1914

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

ACT OF MARCH 20, 1922

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has

ACT OF MARCH 20, 1922--Continued

been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

ACT OF SEPTEMBER 1, 1937

Implementation of the Act of Sept. 1, 1937 (Reindeer Industry Act), is committed to the discretion of the Secretary of the Interior, as delegated to BLM. Where, as required by 43 CFR 4310.1, BLM rejects the application for reindeer grazing privileges only after consulting with the Alaska Department of Fish and Game, which also expressly opposes approval, and where the applicant fails to show error in BLM's and ADF&G's findings, BLM's decision is properly affirmed on appeal.

Donald C. Olson, 120 IBLA 166 (July 22, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

ACT OF AUGUST 24, 1954

Applicants who timely showed that they were owners of land in Wisconsin lying along a meander line, subsequently resurveyed, who held down lands between the original meander and the water shown on the later survey and have, since Jan. 21, 1953, held the land in good faith and peaceful adverse possession, were entitled to

ACT OF AUGUST 24, 1954--Continued

purchase it under the Act of Aug. 24, 1954, known as the O'Konski Act, 43 U.S.C. § 1221 (1988).

Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70  
(Apr. 1, 1991)

ACT OF OCTOBER 18, 1974

A Cooperative Wildlife Habitat-Farming Development Agreement negotiated under the Sikes Act, as amended by the Act of Oct. 18, 1974, 16 U.S.C. § 670g (1988), was properly cancelled when the state agency responsible for monitoring the agreement reported and inspection revealed that there had been a failure to seed, irrigate, and maintain the lands as agreed. An unsupported allegation that facts supporting the decision were not correct was insufficient to overcome the presumption that conditions reported by the public officials were as stated in the record.

George W. Anthony, 119 IBLA 332 (June 18, 1991)

ADMINISTRATIVE AUTHORITY

(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior)

GENERALLY

The Board of Land Appeals has no authority to revise, amend, or clarify language of a United States District Court order defining "appropriate management levels" and "excess."

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within the Department of the Interior.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76  
(Apr. 5, 1991) 98 I.D. 207

The Board of Land Appeals exercises no supervisory authority or appellate jurisdiction over proceedings pending in the district court or over actions taken by a United States Marshal pursuant to a subpoena issued by a district court.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

#### ADMINISTRATIVE AUTHORITY--Continued

##### GENERALLY--Continued

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

##### ESTOPPEL

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL--Continued

The Secretary of the Interior has continuing jurisdiction with respect to public lands until patent issues, and he is not estopped by principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest; so long as legal title remains in the Government, the Secretary has the power and duty, upon proper notice and hearing, to determine whether the claim is valid. The existence of older favorable mineral reports will not preclude a later contest of the validity of mining claims based on a subsequent mineral examination disclosing the absence of a valuable mineral deposit.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

While situations may arise where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been obtained, the Government can never be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral

#### ADMINISTRATIVE AUTHORITY--Continued

##### ESTOPPEL--Continued

considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

#### ADMINISTRATIVE PRACTICE

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)  
98 I.D. 321

#### ADMINISTRATIVE PROCEDURE

(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice)

##### GENERALLY

Pursuant to 43 CFR 2631.1, the Department may require applicants for patent under the Transportation

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Act of 1940 to provide specific proof of transfer of title.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

Pursuant to provision of 43 CFR 3162.3-4, the Department must allow an oil and gas operator a reasonable time to produce or plug and abandon a well in which oil and gas is not encountered in paying quantities. It was not unreasonable to require an operator to plug and abandon a well after the operator was allowed from Aug. 1988 until Feb. 1990 to produce the well.

Viking Exploration, Inc., 119 IBLA 73 (Apr. 5, 1991)

If an appellant's notice of appeal did not include a SOR for the appeal, the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. Where no SOR is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

## ADMINISTRATIVE PROCEDURE--Continued

### GENERALLY--Continued

To the extent that a unit operator is delegated with all rights of the working interest owners with respect to allocation of production, receipt by the unit operator of a notice by BLM accepting the unit operator's determination that a well completion is noncommercial constitutes constructive service of that notice on the working interest owners.

Where, under a joint Federal/State unit agreement, authority for the approval of a noncommerciality determination is vested in the authorized officer, the New Mexico Land Commissioner, or the New Mexico Conservation Commission, depending upon whether the well in question is completed on Federal, State, or private land, respectively, a notice that BLM is filing a noncommerciality determination for a well not located on Federal land "for the record" does not constitute an appealable decision under 43 CFR 4.410.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

### ADJUDICATION

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit

## ADMINISTRATIVE PROCEDURE--Continued

### ADJUDICATION--Continued

has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

In a contest not involving a patent application, when the Government raises an issue not set out in the

## ADMINISTRATIVE PROCEDURE--Continued

### ADJUDICATION--Continued

complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

## ADMINISTRATIVE PROCEDURE--Continued

### ADMINISTRATIVE LAW JUDGES

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

### ADMINISTRATIVE PROCEDURE ACT

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD

When a BIA Area Director denies an application for a loan guaranty on the grounds that he or she lacks confidence in the ability of a new business to repay the loan out of its profits, the administrative record should show how the Area Director reached this conclusion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

Where the Bureau of Indian Affairs conducts a hearing under 25 CFR 211.27, it is responsible for preserving the evidence presented at the hearing.

When the administrative record fails to support a Bureau of Indian Affairs Area Director's decision that an oil and gas lease of Indian land has expired because of failure to produce oil and/or gas in paying quantities, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

#### ADMINISTRATIVE PROCEDURE--Continued

##### ADMINISTRATIVE RECORD--Continued

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co.,  
121 IBLA 278 (Nov. 19, 1991)

##### ADMINISTRATIVE REVIEW

The Department's regulations implementing the EAJA provide a two-tier adjudicatory procedure in which an application for an award of fees and expenses is filed with the adjudicative officer who presided at the adversary adjudication, and the decision of that officer on the application is then appealable to the appropriate appeals board. When an application is filed in the first instance with the Board of Land Appeals, it will ordinarily be transferred to the appropriate adjudicative officer; however, where, as a matter of law, the application must be denied, the Board may adjudicate the application, since transfer of the application would serve no useful purpose.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that a right-of-way is subject to cost recovery, Category I, has the burden of establishing by

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

a preponderance of the evidence that the BLM determination is incorrect.

Joe B. Kearl, 119 IBLA 122 (Apr. 22, 1991)

The Board of Land Appeals lacks jurisdiction to review appeals from decisions establishing resource management plans. If it is not alleged and the record does not show that there has been a decision implementing such a plan, an appeal challenging the plan will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

BLM is responsible for administering the public lands and it must be accorded the discretion necessary effectively to discharge that duty. Where a BLM decision to rehabilitate the Spanish Ridge Road within the King Range National Conservation Area is based on a consideration of all relevant factors, and is supported by the record, which includes an environmental assessment, it may not be overcome by a mere statement of a difference of opinion regarding the necessity for and effect of such action.

William R. Franklin, Linda Smith Franklin, 121 IBLA 37 (Oct. 16, 1991)

In exercising the authority of the Secretary of the Interior to review decisions issued by officials of the BIA, the Board of Indian Appeals is not limited by the standards of review set forth in the APA, 5 U.S.C. § 706 (1988), for review of agency decisionmaking by the Federal courts.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24 (Oct. 22, 1991)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co.,  
121 IBLA 278 (Nov. 19, 1991)

Decisions made by officials of the BIA as supervisors of Indian timber leases will be upheld when they are reasonable and based upon substantial evidence in the record.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't  
Portland Area Director, Bureau of Indian Affairs,  
21 IBIA 116 (Dec. 19, 1991)

BURDEN OF PROOF

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of  
Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

Choctaw Nation of Oklahoma v. Muskogee Area Director,  
Bureau of Indian Affairs, 19 IBIA 243 (Feb. 26, 1991)

Winlock Veneer Co. v. Acting Juneau Area Director,  
Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

S&H Concrete Construction, Inc. v. Acting Phoenix Area  
Director, Bureau of Indian Affairs, 20 IBIA 176  
(Aug. 13, 1991)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

Keith Dahl v. Ass't Portland Area Director, Bureau of Indian Affairs, 20 IBIA 225 (Aug. 28, 1991)

Sauk-Suiattle Indian Tribe v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 238 (Sept. 6, 1991)

Gilbert Keester v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 277 (Sept. 24, 1991)

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs, 21 IBIA 116 (Dec. 19, 1991)

Any party appealing from a decision of an officer of the Bureau of Land Management has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

Corrections to inventories in Indian estates may not be pursued through administrative appeals of unrelated BIA decisions.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Georgianna L. Danks v. Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 79 (June 12, 1991)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

A Cooperative Wildlife Habitat-Farming Development Agreement negotiated under the Sikes Act, as amended by the Act of Oct. 18, 1974, 16 U.S.C. § 670g (1988), was properly cancelled when the state agency responsible for monitoring the agreement reported and inspection revealed that there had been a failure to seed, irrigate, and maintain the lands as agreed. An unsupported allegation that facts supporting the decision were not correct was insufficient to overcome the presumption that conditions reported by the public officials were as stated in the record.

George W. Anthony, 119 IBLA 332 (June 18, 1991)

Implementation of the Act of Sept. 1, 1937 (Reindeer Industry Act), is committed to the discretion of the Secretary of the Interior, as delegated to BLM. Where, as required by 43 CFR 4310.1, BLM rejects the application for reindeer grazing privileges only after consulting with the Alaska Department of Fish and Game, which also expressly opposes approval, and where the applicant fails to show error in BLM's and ADF&G's findings, BLM's decision is properly affirmed on appeal.

Donald C. Olson, 120 IBLA 166 (July 22, 1991)

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Raymond E. Patchen v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 219 (Aug. 27, 1991)

## ADMINISTRATIVE PROCEDURE--Continued

### BURDEN OF PROOF--Continued

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton,  
9 OHA 108 (Nov. 12, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

### HEARINGS

Where the record on appeal presents unresolved questions of fact or undecided, significant legal issues, under 43 CFR 4.415 the Board of Land Appeals has discretionary authority to refer the matter for a hearing.

Jerome P. McHugh & Associates (On Reconsideration),  
117 IBLA 303 (Jan. 17, 1991)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

A second hearing will not be afforded if an appellant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

The Board of Indian Appeals will not refer a case for an evidentiary hearing pursuant to 43 CFR 4.337(a) when the resolution of the factual disputes is not necessary for disposition of the case.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

Where the Bureau of Indian Affairs conducts a hearing under 25 CFR 211.27, it is responsible for preserving the evidence presented at the hearing.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

## ADMINISTRATIVE PROCEDURE--Continued

### HEARINGS--Continued

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

### JUDICIAL REVIEW

The Board of Land Appeals has no authority to revise, amend, or clarify language of a United States District Court order defining "appropriate management levels" and "excess."

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

## ADMINISTRATIVE PROCEDURE--Continued

### JUDICIAL REVIEW--Continued

The Board of Land Appeals exercises no supervisory authority or appellate jurisdiction over proceedings pending in the district court or over actions taken by a United States Marshal pursuant to a subpoena issued by a district court.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

### STANDING

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

Determinations of judicial standing do not control adjudications of administrative standing. Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a).

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

Where an appeal to the Board of Indian Appeals should have been filed by or on behalf of a partnership, a limited partner lacks standing if he would lack authority to bring a derivative action under the state law governing the partnership.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

The assignee of an unapproved assignment of a right-of-way has standing to appeal from a decision increasing the rental of the right-of-way.

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to

## ADMINISTRATIVE PROCEDURE--Continued

### STANDING--Continued

reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

## ALASKA

### NATIVE ALLOTMENTS

An assertion by a Native allotment applicant that he used four different parcels that are separated by significant distances during the same time period is doubtful. Where the asserted occupancy is for only 13 days (and is likely less), and no improvements were placed on the parcel, the applicant has failed to demonstrate substantially continuous use and occupancy at least potentially exclusive of others. A decision by BLM approving an allotment for the parcel is properly set aside and the case remanded for initiation of a Government contest against the application for the parcel.

A BLM decision that a Native allotment applicant has satisfied the occupancy requirements of the Native Allotment Act based on (1) existence of a cabin on the parcel, and (2) the applicant's assertion that he occupied the parcel 18 days a year will be set aside and the case remanded for further investigation where the record shows that the applicant's occupancy was likely less than 18 days and there is no evidence either that the applicant owned the cabin or that the condition of the cabin was such that it did not appear to be abandoned. On remand, BLM should consider other relevant factors, as the presence of a cabin does not by itself render occupancy qualifying.

National Park Service, 117 IBLA 247 (Jan. 9, 1991)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not described in the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a factfinding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1988), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed where the applicant is seeking land in addition to that described in the original application.

Mitchell Allen, 117 IBLA 330 (Jan. 24, 1991)

The party seeking reinstatement of a previously rejected Native allotment application must support that request with evidence of a significant error in the original application. A request for reinstatement of a Native allotment application will be denied if the party seeking reinstatement does no more than speculate that an error may have been committed, fails to appeal from the initial determination, and does nothing regarding the rejected application for a period of 15 years.

It is not necessary to reinstate a Native allotment application to afford an opportunity for a hearing if the initial BLM determination was based upon the applicant's declaration of material facts which demonstrate conclusively that the application must be rejected as a matter of law and the applicant fails to tender sufficient evidence of a significant error on the face of the original application. If no hearing is called for and the Native applicant had been afforded an opportunity to appeal to this Board, there is no compelling legal or

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

equitable reason to reinstate the application merely to afford an opportunity for a hearing.

Franklin Silas, 117 IBLA 358 (Jan. 31, 1991)

Where an affidavit in support of a claim that the relinquishment of a Native allotment application was involuntary and unknowing is insufficient to raise a genuine issue of material fact, and where the record shows that the applicant relinquished his Native allotment application to obtain a portion of the same land by means of a homestead entry application and later received a patent under the homestead laws, BLM properly denied a request to reinstate the Native allotment application.

Heir of Frank Hobson, 117 IBLA 368 (Feb. 7, 1991)

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

A protest by the State of Alaska against a Native allotment filed under sec. 905(a)(5)(B) of ANILCA will be considered sufficient to require the adjudication of the application pursuant to the Native Allotment Act where, as supplemented by information provided to BLM and the Board, it provides information showing that the allotment probably conflicts with an existing winter trail. A BLM decision denying the State's protest on

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

the grounds that no trail exists that conflicts with the Native allotment will be set aside where the record reveals that such a trail does exist. On remand, BLM must adjudicate the allotment, under the provisions of the Native Allotment Act of 1906, considering whether the existence of the trail affects BLM's conclusions that her use was at least potentially exclusive.

State of Alaska (Molly Tocktoo), 118 IBLA 1 (Feb. 13, 1991)

While the principal means by which a person becomes a "party to a case" within the meaning of 43 CFR 4.410(a) is to actively participate in the decision-making process which leads to the appeal, it is not the only means. Where BLM approves a Native allotment application on National Park System lands and the National Park Service files an appeal of that decision, the status of the National Park Service as the agency charged with administrative responsibilities for the management of such lands satisfies the "party to a case" requirement of 43 CFR 4.410(a).

Where the record in a Native allotment case contains conflicting evidence regarding the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

National Park Service, 118 IBLA 204 (Mar. 6, 1991)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the Native community association claims reconveyance rights, must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991)

A decision recognizing that a Native allotment is subject to an easement for highway purposes extending 50 feet on each side of the centerline of a road conveyed to the State of Alaska by a quit-claim deed issued pursuant to the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 141, will be affirmed where an easement of that width had been established under the Act of June 30, 1932, 47 Stat. 446.

Frank Sanford et al., 119 IBLA 147 (Apr. 29, 1991)

BLM properly denies reinstatement of a Native allotment application for land within the Tongass National Forest filed by a Native who did not personally use and occupy the land before it was included in the forest.

Irene K. Jimmy, 119 IBLA 226 (May 14, 1991)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Where the State challenges a BLM decision confirming legislative approval of a Native allotment application pursuant to sec. 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), on the basis that BLM effectively amended the description of the land claimed in the application to conform to a 1986 survey, thereby shifting the location of the allotment claim to another section, without requiring the applicant to demonstrate that this was the land she had originally intended to claim and affording the State an opportunity to file a protest, the Board will initially refer the case for a hearing to decide what land the applicant had intended to claim, especially where that land may no longer exist due to erosion of the shoreline bordering that land.

State of Alaska, 119 IBLA 260 (May 22, 1991)

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

A purported relinquishment of a Native allotment application by the widow of the deceased applicant who is not vested with authority to relinquish the interest of the applicant's heirs is legally ineffective.

The fiduciary relationship of the Department of the Interior with Alaska Natives requires reinstatement and adjudication of a Native allotment application as to those lands for which an unauthorized relinquishment was

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

improperly accepted regardless of the subsequent selection. If the Native allotment application is found to be valid, the Department is obligated to pursue recovery of the land through negotiation with the State or litigation.

Theodore Suckling (Heir to Chief Alexander), 121 IBLA 52 (Oct. 23, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Reconsideration of a Departmental decision revoking approval of and rejecting an application for a Native allotment is appropriate where the record fails to demonstrate that the applicant (or heirs) received notice of the decision, had the opportunity to challenge that decision, and failed to take action to obtain review of the decision. A BLM decision denying reinstatement of a Native allotment application will be reversed where the record does not show that the applicant or his heirs received notice of the revocation/rejection decision. Similarly, a BLM decision denying reinstatement of a Native allotment application will be reversed where the case file does not contain a copy of the revocation/rejection decision sent to the applicant or his heirs and the Board is unable to determine whether that decision adequately informed the applicant of the opportunity to obtain review of the decision.

Heirs of Alexander Williams, Heirs of George Edwin, Heirs of James Butler, 121 IBLA 224 (Nov. 13, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(b) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

## ALASKA--Continued

### STATEHOOD ACT

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

Pursuant to sec. 906(f)(2) of ANILCA, 43 U.S.C. § 1635(f)(2) (1988), the State of Alaska may relinquish any selection of land filed under the Alaska Statehood Act prior to tentative approval, except for land conveyed pursuant to subsec. (g). A protest against the relinquishment of such a selection is properly denied where the unrelinquishment portion of the selection is in conformity with the requirements of pertinent statutes and regulations.

Ed Ellis, 118 IBLA 350 (Mar. 14, 1991)

### TOWNSITES

Because the Alaska Townsite Trustee has no authority to withdraw land from settlement under the townsite laws in favor of a joint venture composed of two Native village corporations, such an attempted withdrawal does not preclude the timely initiation and occupancy of townsite claims by other individuals.

Where a townsite claimant stakes a claim and moves a house onto the claim and occupies it prior to revocation of the townsite laws by the Federal Land Policy and

ALASKA--Continued

TOWNSITES--Continued

Management Act of 1976, and the record shows the claimant's expressed intent to occupy the entire claim, he has established an entitlement to that claim.

Marlin L. Virg-in, City of St. Mary's, 117 IBLA 285  
(Jan. 16, 1991)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

DUTY OF DEPARTMENT OF THE INTERIOR TO  
NATIVE ALLOTMENT APPLICANTS

A purported relinquishment of a Native allotment application by the widow of the deceased applicant who is not vested with authority to relinquish the interest of the applicant's heirs is legally ineffective.

The fiduciary relationship of the Department of the Interior with Alaska Natives requires reinstatement and adjudication of a Native allotment application as to those lands for which an unauthorized relinquishment was improperly accepted regardless of the subsequent selection. If the Native allotment application is found to be valid, the Department is obligated to pursue recovery of the land through negotiation with the State or litigation.

Theodore Suckling (Heir to Chief Alexander), 121 IBLA 52  
(Oct. 23, 1991)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

DUTY OF DEPARTMENT OF THE INTERIOR TO  
NATIVE ALLOTMENT APPLICANTS--Continued

Reconsideration of a Departmental decision revoking approval of and rejecting an application for a Native allotment is appropriate where the record fails to demonstrate that the applicant (or heirs) received notice of the decision, had the opportunity to challenge that decision, and failed to take action to obtain review of the decision. A BLM decision denying reinstatement of a Native allotment application will be reversed where the record does not show that the applicant or his heirs received notice of the revocation/rejection decision. Similarly, a BLM decision denying reinstatement of a Native allotment application will be reversed where the case file does not contain a copy of the revocation/rejection decision sent to the applicant or his heirs and the Board is unable to determine whether that decision adequately informed the applicant of the opportunity to obtain review of the decision.

Heirs of Alexander Williams, Heirs of George Edwin,  
Heirs of James Butler, 121 IBLA 224 (Nov. 13, 1991)

NATIVE ALLOTMENTS

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not described in the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a factfinding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1988), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed where the applicant is seeking

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

land in addition to that described in the original application.

Mitchell Allen, 117 IBLA 330 (Jan. 24, 1991)

A protest by the State of Alaska against a Native allotment filed under sec. 905(a)(5)(B) of ANILCA will be considered sufficient to require the adjudication of the application pursuant to the Native Allotment Act where, as supplemented by information provided to BLM and the Board, it provides information showing that the allotment probably conflicts with an existing winter trail. A BLM decision denying the State's protest on the grounds that no trail exists that conflicts with the Native allotment will be set aside where the record reveals that such a trail does exist. On remand, BLM must adjudicate the allotment, under the provisions of the Native Allotment Act of 1906, considering whether the existence of the trail affects BLM's conclusions that her use was at least potentially exclusive.

State of Alaska (Molly Tocktoo), 118 IBLA 1 (Feb. 13, 1991)

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the Native community association claims reconveyance rights, must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

BLM properly denies reinstatement of a Native allotment application for land within the Tongass National Forest filed by a Native who did not personally use and occupy the land before it was included in the forest.

Irene K. Jimmy, 119 IBLA 226 (May 14, 1991)

Where the State challenges a BLM decision confirming legislative approval of a Native allotment application pursuant to sec. 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), on the basis that BLM effectively amended the description of the land claimed in the application to conform to a 1986 survey, thereby shifting the location of the allotment claim to another section, without requiring the applicant to demonstrate that this was the land she had originally intended to claim and affording the State an opportunity to file a protest, the Board will initially refer the case for a hearing to decide what land the applicant had intended to claim, especially where that land may no longer exist due to erosion of the shoreline bordering that land.

State of Alaska, 119 IBLA 260 (May 22, 1991)

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66  
(Oct. 25, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootooqooluk), 121 IBLA 363  
(Dec. 19, 1991)

## ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

### STATE SELECTIONS

Pursuant to sec. 906(f)(2) of ANILCA, 43 U.S.C. § 1635(f)(2) (1988), the State of Alaska may relinquish any selection of land filed under the Alaska Statehood Act prior to tentative approval, except for land conveyed pursuant to subsec. (g). A protest against the relinquishment of such a selection is properly denied where the unrelinquishment portion of the selection is in conformity with the requirements of pertinent statutes and regulations.

Ed Ellis, 118 IBLA 350 (Mar. 14, 1991)

### VALID EXISTING RIGHTS

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the Native community association claims reconveyance rights, must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn., 118 IBLA 334 (Mar. 12, 1991)

## ALASKA NATIVE CLAIMS SETTLEMENT ACT

### GENERALLY

Unpatented mining claims located on land conveyed to Doyon, Ltd., an Alaska Native corporation, pursuant to provision of sec. 22 of ANCSA, may no longer be administered by the Department, because the filing and recording provisions of sec. 314 of FLPMA apply only to

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

GENERALLY--Continued

public lands of the United States and do not permit continued administration of lands conveyed out of Federal ownership.

Margaret L. Mespelt & Theodore J. Almasy, 118 IBLA 60 (Feb. 21, 1991)

ADMINISTRATIVE PROCEDURE

Decision to Issue Conveyance

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

## ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

### APPEALS

#### Standing

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

### CONVEYANCES

#### Easements

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements--Continued

access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

Reconveyances

A Native community association asserting that it used and occupied lands later claimed as a Native allotment must protest the allotment application pursuant to sec. 905(a)(5) of ANILCA in order to have its claim adjudicated. In the absence of a timely protest, legislative approval of the allotment application occurs, and the village selection application, through which the Native community association claims reconveyance rights, must be rejected insofar as it conflicts with the allotment.

Stebbins Community Assn, 118 IBLA 334 (Mar. 12, 1991)

EASEMENTS

Access

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Access--Continued

protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted to a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

Decision to Reserve

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS

Village Selections

Conveyance of lands previously withdrawn under the authority of sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (198), to a Native village pursuant to a selection made under the provisions provided by sec. 24 (1988), was subject to reservations provided by sec. 24 of the Federal Power Act.

"High-water mark." The "high-water mark" of a body of water is the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. Where a reservoir is excepted from a conveyance of the surrounding lands by reference to its high-water mark, the boundary of the lands conveyed is identifiable by observing multiple factors indicating the extent of the normal impoundment of water.

Alaska Power Administration, 119 IBLA 301 (June 11, 1991)

APPEALS

(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indians, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970)

GENERALLY

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

## APPEALS--Continued

### GENERALLY--Continued

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

An appeal may properly be dismissed as moot where the Board can grant no further relief because of events occurring subsequent to the appeal.

Animal Protection Institute of America, 118 IBLA 20 (Feb. 15, 1991)

Where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an ALJ pursuant to 43 CFR 4.470, and wild horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild horse appeal may properly be referred to the ALJ to the

APPEALS--Continued

GENERALLY--Continued

extent it involves factual issues for hearing and consideration together with the grazing appeal.

Animal Protection Institute of America, Roy Shurtz,  
118 IBLA 345 (Mar. 13, 1991)

An appeal is properly dismissed as moot if, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant and no reasonable expectation or demonstrated probability that the same controversy will again occur involving the same complaining party. Where an appeal was taken in reliance on a provision of law appearing in an annual appropriations act prohibiting export of unprocessed timber from Federal lands, but the provision appearing in the appropriations act was later replaced by a more detailed statute, the probability the same controversy will be repeated is slight.

Oregon Cedar Products Co., 119 IBLA 89 (Apr. 9, 1991)

An appeal brought by a person who has not shown that he is qualified under 43 CFR 1.3 to represent the party issued and adversely affected by a trespass notice is properly dismissed.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is

APPEALS--Continued

GENERALLY--Continued

not an appealable decision. An appeal from such a letter will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

When a Bureau of Indian Affairs Area Director fails to issue a decision in a matter appealed to him, the Superintendent's decision cannot properly be said to be "final" for the Department of the Interior.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

## APPEALS--Continued

### GENERALLY--Continued

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Ass't Secretary--Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Ass't Secretary, or when a right of review is established in regulations.

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

When the parties in a case before the Board of Indian Appeals are identical to those in a case decided by the Ass't Secretary--Indian Affairs, the case raises the same issues, and the issues arise from the same transaction, the Board, as a matter of comity, will defer to the Ass't Secretary's decision because the appellant has already received a decision by a Secretarial-level official of the Department.

Bob Begay v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 248 (Sept. 20, 1991)

A decision issued by a BIA official cannot properly be said to be "final" when a notice of appeal was filed from that decision, but was not acted upon as required by relevant regulations.

Zonnie Bahe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 255 (Sept. 23, 1991)

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends

## APPEALS--Continued

### GENERALLY--Continued

the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

If, during the course of an appeal to the Board of Indian Appeals, the BIA determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions is taken through the filing of an appropriate document with the Board.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

As a general rule, the effect of a decision is stayed pending an opportunity for administrative review of the decision pursuant to the appeal regulation at 43 CFR 4.21(a). An exception is recognized with respect to decisions regarding the readjusted terms (including royalty rate) of coal leases where the relevant regulation provides that the decision shall be effective as of

APPEALS--Continued

GENERALLY--Continued

the lease anniversary date regardless of whether an appeal is filed.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

JURISDICTION

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within the Department of the Interior.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

Refusal to accept personal delivery of a BLM decision does not vitiate service of the decision. A notice of appeal transmitted more than 30 days after personal service of the decision being appealed is untimely and the appeal must be dismissed.

Humane Society of Southern Nevada, 119 IBLA 216 (May 13, 1991)

The Board of Land Appeals lacks jurisdiction to review appeals from decisions establishing resource management plans. If it is not alleged and the record does not show that there has been a decision implementing such a plan, an appeal challenging the plan will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

APPEALS--Continued

JURISDICTION--Continued

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

When, in submitting a claim to the contracting officer in excess of \$50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953 (Oct. 29, 1991) 98 I.D. 355

## APPLICATIONS AND ENTRIES

### GENERALLY

BLM may properly reject a noncompetitive oil and gas lease offer for lands which received a minimum bid at a competitive oil and gas lease sale, even though the bidder subsequently withdrew the bid.

Donald J. Eckelberg, 117 IBLA 390 (Feb. 13, 1991)

The Secretary of the Interior has the discretionary authority to grant an application to purchase public lands under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 to 869-4 (1988). A decision rejecting such an application for land to be used as a bicycle rest area will be set aside where BLM fails to provide a rational basis for its determination that the proposed use of the land as shown in the development and management plans for the project does not justify disposal of the land to appellant.

The City of Chico, 119 IBLA 136 (Apr. 23, 1991)

### RELINQUISHMENT

Where an affidavit in support of a claim that the relinquishment of a Native allotment application was involuntary and unknowing is insufficient to raise a genuine issue of material fact, and where the record shows that the applicant relinquished his Native allotment application to obtain a portion of the same land by means of a homestead entry application and later received a patent under the homestead laws, BLM properly denied a request to reinstate the Native allotment application.

Heir of Frank Hobson, 117 IBLA 368 (Feb. 7, 1991)

## APPLICATIONS AND ENTRIES--Continued

### RELINQUISHMENT--Continued

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

### APPRAISALS

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

#### APPRAISALS--Continued

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including the development of small trade or manufacturing concerns. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market value for a commercial-use lease will not be set aside on appeal if appellant fails to show error in the appraisal method used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

A decision determining back rental for a period of unauthorized use of a site used as an oil well servicing facility will be set aside and remanded where the record fails to establish how BLM arrived at the determination of past annual fair market rental value.

Sierra Production Service, 118 IBLA 259 (Mar. 11, 1991)

A BLM increase in the annual rental charge for a communications site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market value of the right-of-way by the comparable lease method of appraisal.

Questar Service Corp., 119 IBLA 65 (Mar. 29, 1991)

BLM's appraisal of the value of the land to be involved in an exchange pursuant to sec. 206 to FLPMA, as amended, 43 U.S.C. § 1716 (1988), will not be overturned where the protestant fails to submit any evidence of a contrary value or that BLM erred in its appraisal method or results.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

#### APPRAISALS--Continued

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

AMAX Magnesium, 119 IBLA 281 (June 6, 1991)

#### APPRAISALS--Continued

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

#### APPRAISALS--Continued

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240  
(Aug. 9, 1991)

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991)

The assignee of an unapproved assignment of a right-of-way has standing to appeal from a decision increasing the rental of the right-of-way.

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees

APPRAISALS--Continued

charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton,  
9 OHA 108 (Nov. 12, 1991)

The holder of a right-of-way grant for a salt water disposal site is required to pay annually, in advance, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. In accordance

APPRAISALS--Continued

with 43 CFR 2803.1-2(c)(3)(i), rental for non-linear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels.

A BLM decision adjusting the rental for a salt water disposal site right-of-way from a per acre fee to a fee per barrel of disposed water will be affirmed where the adjusted rental is based on a market survey of comparable salt water disposal leases which indicates that a per barrel fee is utilized in the market place to determine rentals, and the appellant has neither demonstrated error in that methodology nor shown that the rental charges are excessive.

Laguna Gatuna, Inc., 121 IBLA 302 (Dec. 3, 1991)

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including agriculture. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market rental value for an agricultural lease will be affirmed on appeal where an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Russell A. Beaver, J. F. Beaver, 121 IBLA 386 (Dec. 26, 1991)

#### ATTORNEYS

An individual participating in a Departmental Indian probate proceeding without an attorney is still required to raise all issues and arguments at the hearing.

Estate of Gus Four Eyes, Jr., aka Gilford Fireshaker,  
20 IBIA 22 (May 6, 1991)

#### BOARD OF INDIAN APPEALS

##### GENERALLY

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

Where an appeal to the Board of Indian Appeals should have been filed by or on behalf of a partnership, a limited partner lacks standing if he would lack authority to bring a derivative action under the state law governing the partnership.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION

The Board of Indian Appeals lacks jurisdiction to consider an argument that a homesite lease violated regulations of the Department of Housing and Urban Development.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

Decisions concerning the approval of a mortgage of Indian trust or restricted land under 25 U.S.C. § 483a (1988), are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Caroline D. & James D. Tyler v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 144 (Jan. 8, 1991)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Jack & Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 164 (Jan. 25, 1991) 98 I.D. 5

Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296 (Apr. 17, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Washoe Tribe of Nevada & California v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 190 (Feb. 5, 1991)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure proper consideration was given to all legal prerequisites to the exercise of discretion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

The Board of Indian Appeals lacks jurisdiction over appeals from decisions of officials of the General Land Office or the Bureau of Land Management concerning Indian allotments on the public domain.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether a request for a U.S. Direct Loan should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

David Pourier v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 266 (Mar. 21, 1991)

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

A Bureau of Indian Affairs decision concerning the eligibility of a tribe for a Core Management grant under 25 CFR 278.22(a)(1) is a decision based on a legal conclusion and is subject to review by the Board of Indian Appeals.

Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 20 IBIA 39 (May 21, 1991)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to order restitution.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the BIA or an Indian tribe.

U.S. Fish Corp. v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 93 (June 25, 1991)

The Board of Indian Appeals is not a court of general jurisdiction. It has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine tort claims against the United States.

John P. Taylor, dba Taylor Logging v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 101 (July 5, 1991)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a trust patent issued by BLM or to determine aboriginal title to land.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure proper consideration was

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

given to all legal prerequisites to the exercise of discretion.

Helen Polzer et al. v. Minneapolis Area Director, Bureau of Indian Affairs, 20 IBIA 158 (Aug. 5, 1991)

Decisions concerning whether an application for a loan under the Indian Revolving Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 176 (Aug. 13, 1991)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to grant equitable relief against an Indian tribe.

Bulletproofing, Inc., & Richard Medlin (President) v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 179 (Aug. 13, 1991)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Sauk-Suiattle Indian Tribe v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 238 (Sept. 6, 1991)

The Board of Indian Appeals lacks jurisdiction to review decisions rendered by the Ass't Secretary--Indian Affairs except when those decisions are specifically referred to it by the Secretary or the Ass't Secretary, or when a right of review is established in regulations.

When the parties in a case before the Board of Indian Appeals are identical to those in a case decided by the Ass't Secretary--Indian Affairs, the case raises the same issues, and the issues arise from the same transaction, the Board, as a matter of comity, will defer to the Ass't Secretary's decision because the appellant has already received a decision by a Secretarial-level official of the Department.

Bob Begay v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 248 (Sept. 20, 1991)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the BIA determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions is taken through the filing of an appropriate document with the Board.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

When a lease of trust or restricted land provides that arbitration "may" be used to resolve disputes arising between the parties, arbitration is not the exclusive remedy available to the parties. The BIA and the Board of Indian Appeals have authority to consider disputes arising under such a lease when the parties do not agree to the use of arbitration.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

The approval of requests to acquire land in restricted fee status for Osage Indians is committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

consideration was given to all legal prerequisites to the exercise of discretion.

Nancy Tillman Keil v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 126 (Dec. 19, 1991)

BOARD OF LAND APPEALS

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

The Board of Land Appeals may assess damages for trespass in the exercise of its de novo review authority which includes the right to determine any factual or legal question necessary to adjudicate an appeal. Where the record on appeal establishes the proper measure of damages but the amount of material taken is shown to be less than was assessed, the current amount of damages is assessed by the Board.

John Aloe & Liberty Masonry, Inc., 117 IBLA 298 (Jan. 17, 1991)

Silence by Departmental officials cannot support a claim of estoppel against the Department. Where officials of BLM issued a notice of drainage to an operator in 1982, but took no further action to enforce the

BOARD OF LAND APPEALS--Continued

notice until 1985, the Department was not estopped to assess compensatory royalty.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in U.S. v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct. The existence of a crucial misstatement of material fact upon which another party relied to its asserted detriment is a prerequisite to the invocation of estoppel.

United States v. Willie White et al., 118 IBLA 266  
(Mar. 12, 1991) 98 I.D. 129

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within the Department of the Interior.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76  
(Apr. 5, 1991) 98 I.D. 207

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells

BOARD OF LAND APPEALS--Continued

its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

The Board of Land Appeals exercises no supervisory authority or appellate jurisdiction over proceedings pending in the district court or over actions taken by a United States Marshal pursuant to a subpoena issued by a district court.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is not an appealable decision. An appeal from such a letter will be dismissed.

The Board of Land Appeals lacks jurisdiction to review appeals from decisions establishing resource management plans. If it is not alleged and the record does not show that there has been a decision implementing such a plan, an appeal challenging the plan will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

BOARD OF LAND APPEALS--Continued

If an appellant's notice of appeal did not include a SOR for the appeal, the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. Where no SOR is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

BUREAU OF INDIAN AFFAIRS  
(See also Indian Probate)

GENERALLY

The BIA is bound by the terms of leases it has approved, when the leases are in accord with governing regulations.

Kenneth F. Abbott v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 268 (Sept. 24, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

GENERALLY--Continued

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

The Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 45 (Nov. 12, 1991)

ADMINISTRATIVE APPEALS

Generally

A Bureau of Indian Affairs Area Director is vested with jurisdiction to decide an appeal arising under 25 CFR Part 2 "if the subject of appeal is a decision by a person under the authority of that Area Director." 25 CFR 2.4(a).

Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 243 (Feb. 26, 1991)

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contract under the Act.

In connection with its authority to rescind an Indian Self-Determination Act contract under 25 U.S.C. § 450m (1988), the BIA has authority to investigate an Indian tribe's performance under the contract.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Corrections to inventories in Indian estates may not be pursued through administrative appeals of unrelated BIA decisions.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Georgianna L. Danks v. Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 79 (June 12, 1991)

When a Bureau of Indian Affairs Area Director fails to issue a decision in a matter appealed to him, the Superintendent's decision cannot properly be said to be "final" for the Department of the Interior.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

After issuing a decision concerning general assistance benefits, a Bureau of Indian Affairs official may reverse that decision within the time for filing an appeal, provided no appeal has been filed.

Linda Stark, Edward Stark, & Frederick Stark v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 121 (July 11, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

A decision issued by a BIA official cannot properly be said to be "final" when a notice of appeal was filed from that decision, but was not acted upon as required by relevant regulations.

Zonnie Bahe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 255 (Sept. 23, 1991)

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a BIA official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the BIA determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions is taken through the filing of an appropriate document with the Board.

Five Sandoval Indian Pueblos, Inc. v. Deputy Comm'r of Indian Affairs, 21 IBIA 17 (Oct. 10, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

A BIA Area Director does not have authority to make his decision final for the Department of the Interior./

Citation Oil & Gas, Ltd. v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 75 (Dec. 17, 1991)

Acts of Agents of the United States

Unauthorized acts of a BIA employee cannot serve as the basis for conferring rights not authorized by law.

D. G. & D. Logging Co. v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 229 (Aug. 29, 1991)

Discretionary Decisions

The Board of Indian Appeals will refer to the Assistant Secretary--Indian Affairs an appeal requiring a decision as to whether to waive regulations set forth in 25 CFR 256.5(b), limiting certain categories of assistance under the Housing Improvement Program.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

When a BIA Area Director denies an application for a loan guaranty on the grounds that he or she lacks confidence in the ability of a new business to repay the loan out of its profits, the administrative record should show how the Area Director reached this conclusion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the BIA issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

David Pourier v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 266 (Mar. 21, 1991)

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Raymond E. Patchen v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 219 (Aug. 27, 1991)

Filing

Mandatory Time Limit

Regulations promulgated by the BIA in 25 CFR 2.10 (1988), established a 30-day period for filing notices of appeal.

Rocky Boy Schools v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 112 (Dec. 19, 1991)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Leases

When a lease of trust or restricted land provides that arbitration "may" be used to resolve disputes arising between the parties, arbitration is not the exclusive remedy available to the parties. The BIA and the Board of Indian Appeals have authority to consider disputes arising under such a lease when the parties do not agree to the use of arbitration.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

BUREAU OF LAND MANAGEMENT

(See also Mineral Leasing Act)

The Board of Indian Appeals lacks jurisdiction over appeals from decisions of officials of the General Land Office or the Bureau of Land Management concerning Indian allotments on the public domain.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

BUREAU OF LAND MANAGEMENT--Continued

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

CLAIMS BY THE UNITED STATES

The Secretary of the Interior is authorized to waive use of funds in Individual Indian Money accounts to satisfy indebtedness of Indians to the United States resulting from errors in recording Indian probate distributions.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 168 (Aug. 13, 1991)

COAL LEASES AND PERMITS  
(See also Mineral Leasing Act)

GENERALLY

Under 43 CFR 3482.2(c)(2), a proposal to modify a mine plan must be submitted in writing, with a justification, by the operator or lessee. It is not effective until it has been approved in writing by the authorized officer.

BLM does not have authority to require payment of royalties for coal that was not mined in accordance with a resource recovery and protection plan, in violation of 43 CFR 3481.1(b), before it is mined later in accordance with an approved modification of the plan.

Utah Power & Light Co., 118 IBLA 181 (Mar. 6, 1991)  
98 I.D. 97

BLM does not have the authority to require payment of royalties for coal which was bypassed and not mined in accordance with a resource recovery and protection plan, regardless of whether the decision to bypass violated the principle of maximum economic recovery or constituted waste of coal reserves.

Cordero Mining Co., 121 IBLA 314 (Dec. 4, 1991)

APPLICATIONS

Standing to appeal a decision to the Board requires that an appellant be a party to the case adversely affected by the decision appealed. An assignee who has filed an application for approval of an assignment of a coal lease lacks standing to appeal a decision finding the assignment subject to approval on provision of a lease bond where the bond requirement is not contested.

G. H. Allen et al., 119 IBLA 272 (May 30, 1991)

## COAL LEASES AND PERMITS--Continued

### APPLICATIONS--Continued

A Federal coal lessee's election not to seek review of lease conditions to determine whether a royalty rate less than 8 percent was warranted for underground operations is not subject to challenge by a sublessee.

Valley Camp of Utah, Inc., Coastal States Energy Co.,  
120 IBLA 201 (Aug. 5, 1991)

### DILIGENCE

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1988), requires that any coal lease not producing in commercial quantities at the end of the 10-year diligent development period be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Utah Power & Light Co., 117 IBLA 271 (Jan. 15, 1991)

### LEASES

Under 43 CFR 3482.2(c)(2), a proposal to modify a mine plan must be submitted in writing, with a justification, by the operator or lessee. It is not effective until it has been approved in writing by the authorized officer.

BLM does not have authority to require payment of royalties for coal that was not mined in accordance with a resource recovery and protection plan, in violation of 43 CFR 3481.1(b), before it is mined later in accordance with an approved modification of the plan.

Utah Power & Light Co., 118 IBLA 181 (Mar. 6, 1991)  
98 I.D. 97

## COAL LEASES AND PERMITS--Continued

### LEASES--Continued

A coal lessee seeking reduction of the royalty rate on production from 12-1/2 percent to 8 percent must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms. Rejection of such an application may be affirmed where the record supports a finding that a royalty reduction is not necessary to encourage the greatest ultimate recovery of the Federally leased coal in that the bypass of any such coal in favor of privately leased coal would be merely temporary.

Western Energy Co., 119 IBLA 359 (June 21, 1991)

BLM does not have the authority to require payment of royalties for coal which was bypassed and not mined in accordance with a resource recovery and protection plan, regardless of whether the decision to bypass violated the principle of maximum economic recovery or constituted waste of coal reserves.

Cordero Mining Co., 121 IBLA 314 (Dec. 4, 1991)

### READJUSTMENT

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied on coal recovered by underground mining operations from a Federal coal lease, and where BLM's subsequent decision and the accompanying case record fail to disclose a rational basis for its conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside.

BLM should provide the lessee the opportunity to submit data concerning whether conditions warrant a royalty rate of less than 8 percent for coal recovered

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

by underground mining operations on a Federal coal lease, prior to making such determination.

Kanawha & Hocking Coal & Coke Co., 118 IBLA 364  
(Mar. 14, 1991)

A Federal coal lessee's election not to seek review of lease conditions to determine whether a royalty rate less than 8 percent was warranted for underground operations is not subject to challenge by a sublessee.

Objections to readjusted terms of a Federal coal lease did not delay the effective date of the readjusted lease under provision of Departmental regulation 43 CFR 3451(d) (1981).

Valley Camp of Utah, Inc., Coastal States Energy Co.,  
120 IBLA 201 (Aug. 5, 1991)

A decision on lease readjustment pursuant to 30 U.S.C. § 207(a) (1988), and the implementing regulation at 43 CFR 3473.3-2(a)(3) (1987), setting the royalty rate for coal mined by underground operations at 8 percent and declining to reduce it to 5 percent on the basis of lack of evidence of adverse geologic or engineering conditions which would justify a lower rate over the entire term of the lease will be affirmed where supported by the record. A distinction between long-term geologic and engineering conditions likely to continue for the term of the lease, on the one hand, and shorter-term economic conditions which may be addressed in the context of a petition for reduction in royalty under 30 U.S.C. § 209 (1988), on the other hand, will be upheld as a reasonable interpretation of the statute and regulations governing readjustment of the royalty rates for coal leases.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19,  
1991) 98 I.D. 429

## COAL LEASES AND PERMITS--Continued

### RELINQUISHMENT

A request for relinquishment of a coal lease is properly denied pursuant to Departmental regulation 43 CFR 3452.1-3 where the record shows that payment of \$3,753.60 for outstanding accrued rental and interest had not been paid when the request was filed.

That BLM did not take action on a request for relinquishment of a coal lease until 2 years after it was filed, during which time late payment charges accrued, does not relieve the lessee of the obligation to pay late payment charges.

Ametex Corp., 121 IBLA 291 (Nov. 25, 1991)

### RENTALS

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

## COAL LEASES AND PERMITS--Continued

### RENTALS--Continued

A request for relinquishment of a coal lease is properly denied pursuant to Departmental regulation 43 CFR 3452.1-3 where the record shows that payment of \$3,753.60 for outstanding accrued rental and interest had not been paid when the request was filed.

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Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied on coal recovered by underground mining operations from a Federal coal lease, and where BLM's subsequent decision and the accompanying case record fail to disclose a rational basis for its conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside.

BLM should provide the lessee the opportunity to submit data concerning whether conditions warrant a royalty rate of less than 8 percent for coal recovered by underground mining operations on a Federal coal lease, prior to making such determination.

Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (Mar. 14, 1991)

COAL LEASES AND PERMITS--Continued

ROYALTIES--Continued

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Western Energy Co., 119 IBLA 359 (June 21, 1991)

## COAL LEASES AND PERMITS--Continued

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A Federal coal lessee's election not to seek review of lease conditions to determine whether a royalty rate less than 8 percent was warranted for underground operations is not subject to challenge by a sublessee.

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Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19,  
1991) 98 I.D. 429

### TERMINATION

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1988), requires that any coal lease not producing in commercial quantities at the end of the 10-year diligent development period be terminated.

COAL LEASES AND PERMITS--Continued

TERMINATION--Continued

No suspension of this obligation to commence production is authorized by statute or regulation.

Utah Power & Light Co., 117 IBLA 271 (Jan. 15, 1991)

COLOR OR CLAIM OF TITLE

GENERALLY

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

Applicants who timely showed that they were owners of land in Wisconsin lying along a meander line, subsequently resurveyed, who held down lands between the original meander and the water shown on the later survey and have, since Jan. 21, 1953, held the land in good faith and peaceful adverse possession, were entitled to purchase it under the Act of Aug. 24, 1954, known as the O'Konski Act, 43 U.S.C. § 1221 (1988).

Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991)

## COLOR OR CLAIM OF TITLE--Continued

### APPLICATIONS

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

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Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991)

### DESCRIPTION OF LAND

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey

#### COLOR OR CLAIM OF TITLE--Continued

##### DESCRIPTION OF LAND--Continued

showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

##### GOOD FAITH

A class 1 applicant under the Color of Title Act, 43 U.S.C. § 1063 (1988), must show that the land has been held in good faith and in peaceful, adverse possession by the applicant or his predecessors in interest for more than 20 years. If the predecessor's possession is not in good faith, the chain has been broken, and the predecessor's holding period may not be tacked on to that of the applicant. Good faith requires an honest belief by the claimant or the predecessors that they were invested with title. When a predecessor files an application for land between a meander line and a lakeshore and the application is rejected for the stated reason that the land being sought is owned by the upland owner and thus is not Federal ownership, the lack of good faith ordinarily attributable to the filing of that application may be vitiated.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

#### COMMUNICATION SITES

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of

COMMUNICATION SITES--Continued

43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

#### COMMUNICATION SITES--Continued

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240 (Aug. 9, 1991)

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991)

## CONSTITUTIONAL LAW

### DUE PROCESS

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

Due process requires that the owner of an Individual Indian Money account be afforded a prompt hearing when a hold is placed on funds in the account.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 168 (Aug. 13, 1991)

## CONTESTS AND PROTESTS

(See also Administrative Procedure, Rules of Practice)

### GENERALLY

A protest by the State of Alaska against a Native allotment filed under sec. 905(a)(5)(B) of ANILCA will be considered sufficient to require the adjudication of the application pursuant to the Native Allotment Act where, as supplemented by information provided to BLM and the Board, it provides information showing that the allotment probably conflicts with an existing winter trail. A BLM decision denying the State's protest on the grounds that no trail exists that conflicts with the Native allotment will be set aside where the record reveals that such a trail does exist. On remand, BLM must adjudicate the allotment, under the provisions of the Native Allotment Act of 1906, considering whether

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

the existence of the trail affects BLM's conclusions that her use was at least potentially exclusive.

State of Alaska (Molly Tocktoo), 118 IBLA 1 (Feb. 13, 1991)

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

## CONTESTS AND PROTESTS--Continued

### GENERALLY--Continued

A decision by BLM may be summarily affirmed where the statement of reasons filed in support of an appeal fails to point out error in the decision under review but instead merely reiterates arguments addressed to BLM in a protest and where the BLM decision on the protest is comprehensive and fully addresses each of the arguments contained in the protest.

In re Mill Creek Salvage Timber Sale, 121 IBLA 360  
(Dec. 18, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363  
(Dec. 19, 1991)

## CONTESTS AND PROTESTS--Continued

### GOVERNMENT CONTESTS

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

## CONTRACT DISPUTES ACT OF 1978

### GENERALLY

The Board is entitled to dismiss an appeal if the appellant fails to prosecute it and/or to respond in a timely manner.

Appeals of Marty Indian School, IBCA-2563 et al.  
(Jan. 17, 1991) 98 I.D. 1

### ATTORNEY FEES

#### Allowable Expenses

Under the EAJA, a pro se applicant may recover "expenses," which is defined by the Federal Circuit to include "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of

CONTRACT DISPUTES ACT OF 1978--Continued

ATTORNEY FEES--Continued

Allowable Expenses--Continued

the specific case before the court, which expenses are customarily charged to the client where the case is filed." Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987).

A contractor was allowed to recover attorney fees and expenses for out-of-state counsel under an EAJA application, despite the Government's position that the fees be disallowed as the contractor could have retained an attorney located closer to its place of business. The Board rejected the Government's argument, concluding that it would impair a party's right to competent counsel of its choice.

When attorney fees were actually billed at the statutory maximum rate of \$75 per hour in accordance with the EAJA, the Board made no distinction between the hourly rate charged for partner or associate time. Otherwise, associate attorney time was allowed at the lower rate billed the applicant.

Attorney fees and expenses incurred by an applicant as a result of a change in law firms were found to be reasonable under an EAJA application, when the evidence showed that the legal services provided by the second firm were not duplicative of the first and were in connection with the underlying adjudication.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F  
(Aug. 2, 1991)

CONTRACT DISPUTES ACT OF 1978--Continued

ATTORNEY FEES--Continued

Application and Jurisdiction

Absent a motion for reconsideration or an appeal to the Federal Circuit, under the EAJA an applicant has 150 days from receipt of the Board's decision or order dismissing the appeal to file a request for attorney fees and expenses.

An EAJA application for attorney fees and expenses arising out of a CDA adjudication is not governed by the procedural requirements of 43 CFR Part 4.6 of the Departmental regulations, which apply to certain "adversary adjudications conducted by the Secretary under 5 U.S.C. § 554" (Administrative Procedures Act). CDA appeals are not pursuant to the Administration Procedures Act, nor conducted by the Secretary. Thus, a contractor's EAJA application was found to meet all EAJA eligibility requirements, although it did not satisfy the more stringent rules set forth in the Part 4.6 regulations.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

Substantially Justified

A construction contractor's application under the EAJA for an award of attorney fees and expenses was granted, because the Government's position in the underlying adjudication lacked substantial justification. Under the EAJA, "substantial justification" means more than merely the existence of a colorable legal basis for the Government's case. The Government must show its position to be "clearly reasonable," which it failed to do.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

## CONTRACTS

(See also Appeals, Claims Against the United States,  
Delegation of Authority, Labor, Rules of Practice)

### GENERALLY

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

The Uniform Commercial Code and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

Based upon the general law of contracts, Indian contracts contain an implied requirement that they be carried out in good faith and in accordance with standards of commercial reasonableness.

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

### CONSTRUCTION AND OPERATION

#### Generally

In a contract for the provision of an airplane and pilot throughout a mandatory availability period, the Board held that the Government could not use the general default clause as the sole authority on which to base a termination accomplished 23 minutes after the appointed commencement of performance time when the contract also contained a special default clause which established 3

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Generally--Continued

consecutive days of unavailability as "grounds for termination" under the general clause.

Appeal of Pegasus Helicopters, Inc., IBCA-2671 (Mar. 6, 1991)

Actions of Parties

A contractor's onsite examination of a designated source of borrow, combined with a specification provision identifying said borrow as a source of fill material, should have caused a reasonable and prudent contractor to anticipate and take into account in its bid price that the existing site conditions were such that it might be necessary to utilize an unquantified amount of fill material to perform the excavation and embankment work under the contract. The contractor's decision not to include a factor for borrow in its bid, was thus held to be an exercise of business judgment, and the contractor assumed the risk that additional borrow might be required.

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Where an "as built" Government analysis of a short-fall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

A contractor is not entitled to impact and extended performance costs incurred as a result of winter damage to excavated roadbeds where the evidence shows that

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

delays associated with the placing of protective aggregate base course, before the winter shutdown, did not arise from unforeseeable causes beyond the contractor's control and without its fault or negligence.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

Appellant's allegations that the Government breached implied duties under the road contract to cooperate with it and assist its performance -- duties which appellant alleges were enhanced because it is an Indian contract -- fail as a matter of law. The Government was not subject to a higher standard of conduct because appellant is an Indian contractor and did not have any responsibility under the road contract to assist appellant in obtaining or retaining a yard and pit site.

Appellant's allegations of delay and interruption to its work under the road attributable to Governmental action under the road contract. The Government had no duty under that contract to obtain a yard or pit site for appellant.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

When, after award of a contract to produce rifrap from a specified quarry and repair a dam, the contractor inquired about using other than the contract-specified quarry, the Government did not breach its implied duty of good faith and cooperation by advising that approval of an alternate quarry would be virtually impossible.

The Board found the Government did not delay in rejecting appellant's nonconforming work and, even if

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

it had, any Governmental delay would have been concurrent with the contractor's delay in meeting in-place testing requirements and not compensable.

Appeal of White & McNeil Excavating, Inc., IBCA-2448  
(Nov. 4, 1991) 98 I.D. 359

Assignment of Claims

In a case where appellants allude to subrogation claims but fail to identify or quantify them or to show that they were presented to the contracting officer for decision, the Board finds that it is without jurisdiction in the matter. The Board notes, however, that even if subrogation claims (properly certified, if required) cognizable as claims under the CDA had been presented to the contracting officer, appellant Federal, as surety, could only recover on such claims if it is shown that the obligations of its principal had been fully satisfied.

Where appellants assert that the completing surety should be recognized as the "contractor" by reason of a de facto takeover agreement but acknowledge that there was no formal takeover agreement and fail to point to any agreement with the Government following the contractor's default on which they rely as a takeover agreement, the Board finds that the surety is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist.

In addition to moving to dismiss the appeals by reason of improper certification, the Government has also moved to dismiss Federal as a party to the instant appeals on the ground that as a surety it is not a contractor within the meaning of sec. 601(4) of the CDA. Subject to proper certification of the claims upon resubmission thereof, the Board finds that the Government was aware of, assented to, and recognized the

## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### Assignment of Claims--Continued

assignment and that the effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of the surety for the contractor, and to give standing to the surety to prosecute the instant appeals in its own name as the "contractor" within the meaning of the CDA.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

#### Changes and Extras

A cadastral survey contractor is not entitled to an adjustment on the basis of mutual mistake merely because it is unable to meet its expected production rates. A party's prediction as to events that are to occur in the future, or his professional judgment, even if erroneous, is not a compensable mistake. In this case, there is insufficient evidence that the contemplated production rates could not have been achieved by a prudent contractor, and the fixed-price contract placed the risks of unexpected costs of performance on the contractor.

A contractor is not entitled to relief on a theory of constructive change where it failed to show that the Government directed it to perform work that was not required under the contract, or that the Government in any way changed the requirements of the contract after it was entered into.

Appeal of Ocean Technology, Inc., IBCA-2651 (Feb. 27, 1991)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

A contractor's onsite examination of a designated source of borrow, combined with a specification provision identifying said borrow as a source of fill material, should have caused a reasonable and prudent contractor to anticipate and take into account in its bid price that the existing site conditions were such that it might be necessary to utilize an unquantified amount of fill material to perform the excavation and embankment work under the contract. The contractor's decision not to include a factor for borrow in its bid, was thus held to be an exercise of business judgment, and the contractor assumed the risk that additional borrow might be required.

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

Appellant's allegation that it is entitled to recover under the Charges clause of the road contract, because Indian litigation caused it to relocate its yard and pit, fails as a matter of law. The leased area was not part of the contract. Even if it had been, there was no relevant act by the contracting officer constituting an actual or constructive change.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### Changes and Extras--Continued

The Board found the Government did not have superior knowledge about the contract quarry's conditions and, in any case, the quarry was not deficient.

Although one portion of the Government's 36-inch riprap specification was unreasonable, and the Government relaxed it in accepting appellant's rework, the Board found appellant failed to prove the Government's rework requirement was due to the unreasonable part of the specification. Appellant acknowledged that the first two in-place test samples, which led to rejection of its work, were outside the entire required gradation envelope and did not comply with even the relaxed specification. The contract entitles the Government to reject, and to require replacement of, nonconforming work. Moreover, the extent of the rework was due principally to appellant's delay in testing. Thus, the Government was not responsible for the costs of rework. The Board remanded the appeal to the contracting officer, however, to make an adjustment for any payment deduction incorrectly taken based upon the unreasonable portion of the specification.

Appeal of White & McNeil Excavating, Inc., IBCA-2448  
(Nov. 4, 1991) 98 I.D. 359

#### Contract\_Clauses

A contractor's interpretation of the earth work portion of a construction contract, based on its exclusive reliance on the estimated bid item quantities set forth in the specifications, was held to be unreasonable and precluded recovery on the contractor's claim, because such interpretation failed to look beyond the minimum requirements of the contract and ignored other significant contract indications, including borrow information,

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract\_Clauses--Continued

and thus failed to give reasonable meaning to the contract as a whole.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

Contracting Officer

For the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since the contractor, not the Government, is responsible for the conduct of its employees.

Appeals of Marc Industries, IBCA-2905, -2906, (Sept. 4,  
1991) 98 I.D. 263

Differing Site\_Conditions (Changed\_Conditions)

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions)--Continue

Appellant's allegation that it is entitled to an equitable adjustment under the road contract's Differing Site Conditions clause because its leased yard and pit location was part of a secret, sacred Indian religious site, fails as a matter of law. The leased area was not a contract site.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

When a contract provided for "at least 50%" quarry waste, and it was 60 percent, there was no Type I differing site condition. Actual conditions were consistent with those represented. Appellant's interpretation that the quarry would yield about 50 percent waste was found unreasonable. Even if it had been reasonable, or if minimum waste had been understated, appellant did not establish persuasively that it relied upon the waste factor. Quarry geology was not otherwise misrepresented. Because the contract quarry's waste was close to, or substantially less than, other limestone quarries in the area, there was no Type II differing site condition.

Appeal of White & McNeil Excavating, Inc., IBCA-2448  
(Nov. 4, 1991) 98 I.D. 359

Drawings and Specifications

A contractor was not prejudiced by the Government's failure to include cross-section surveys of original ground material in the solicitation package where there was no showing either that the contractor requested and was refused examination thereof prior to bid, or that the

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings\_and\_Specifications--Continued

contractor could not reasonably have calculated any necessary contract estimates on its own, without such cross-sections.

Where a construction contractor failed to show how contract drawings and related estimates were inaccurate because they were based on a centerline design, the Board found that the contract drawings were not substantially defective inasmuch as they contained sufficient information to enable a bidder possessing the requisite skill and knowledge to plot his own cross-sections to determine the approximate quantities of excavation and embankment.

Drawings and specifications, rather than the general estimates of the bidding schedule, govern the size and characteristics of a road construction project, notwithstanding the existence of variations between the estimates and the quantities actually required, even though such variations stemmed partly from errors in the Government computations on which the estimates were based.

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

The Board found the Government did not have superior knowledge about the contract quarry's conditions and, in any case, the quarry was not deficient.

When a contract provided for "at least 50%" quarry waste, and it was 60 percent, there was no Type I differing site condition. Actual conditions were consistent with those represented. Appellant's interpretation that the quarry would yield about

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings\_and\_Specifications--Continued

50 percent waste was found unreasonable. Even if it had been reasonable, or if minimum waste had been understated, appellant did not establish persuasively that it relied upon the waste factor. Quarry geology was not otherwise misrepresented. Because the contract quarry's waste was close to, or substantially less than, other limestone quarries in the area, there was no Type II differing site condition.

Although one portion of the Government's 36-inch riprap specification was unreasonable, and the Government relaxed it in accepting appellant's rework, the Board found appellant failed to prove the Government's rework requirement was due to the unreasonable part of the specification. Appellant acknowledged that the first two in-place test samples, which led to rejection of its work, were outside the entire required gradation envelope and did not comply with even the relaxed specification. The contract entitles the Government to reject, and to require replacement of, nonconforming work. Moreover, the extent of the rework was due principally to appellant's delay in testing. Thus, the Government was not responsible for the costs of rework. The Board remanded the appeal to the contracting officer, however, to make an adjustment for any payment deduction incorrectly taken based upon the unreasonable portion of the specification.

Appeal of White & McNeil Excavating, Inc., IBCA-2448  
(Nov. 4, 1991) 98 I.D. 359

Duty\_to\_Inquire

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Duty to Inquire--Continued

The Board found the Government did not have superior knowledge about the contract quarry's conditions and, in any case, the quarry was not deficient.

Appeal of White & McNeil Excavating, Inc., IBCA-2448  
(Nov. 4, 1991) 98 I.D. 359

Estimated Quantities

A contractor was not prejudiced by the Government's failure to include cross-section surveys of original ground material in the solicitation package where there was no showing either that the contractor requested and was refused examination thereof prior to bid, or that the contractor could not reasonably have calculated any necessary contract estimates on its own, without such cross-sections.

Where a construction contractor failed to show how contract drawings and related estimates were inaccurate because they were based on a centerline design, the Board found that the contract drawings were not substantially defective inasmuch as they contained sufficient information to enable a bidder possessing the requisite skill and knowledge to plot his own cross-sections to determine the approximate quantities of excavation and embankment.

A contractor's interpretation of the earth work portion of a construction contract, based on its exclusive reliance on the estimated bid item quantities set forth in the specifications, was held to be unreasonable and precluded recovery on the contractor's claim, because such interpretation failed to look beyond the minimum requirements of the contract and ignored other significant contract indications, including borrow information,

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Estimated Quantities--Continued

and thus failed to give reasonable meaning to the contract as a whole.

Drawings and specifications, rather than the general estimates of the bidding schedule, govern the size and characteristics of a road construction project, notwithstanding the existence of variations between the estimates and the quantities actually required, even though such variations stemmed partly from errors in the Government computations on which the estimates were based.

A contractor's onsite examination of a designated source of borrow, combined with a specification provision identifying said borrow as a source of fill material, should have caused a reasonable and prudent contractor to anticipate and take into account in its bid price that the existing site conditions were such that it might be necessary to utilize an unquantified amount of fill material to perform the excavation and embankment work under the contract. The contractor's decision not to include a factor for borrow in its bid, was thus held to be an exercise of business judgment, and the contractor assumed the risk that additional borrow might be required.

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### General Rules of Construction

A contractor's interpretation of the earth work portion of a construction contract, based on its exclusive reliance on the estimated bid item quantities set forth in the specifications, was held to be unreasonable and precluded recovery on the contractor's claim, because such interpretation failed to look beyond the minimum requirements of the contract and ignored other significant contract indications, including borrow information, and thus failed to give reasonable meaning to the contract as a whole.

A contractor's differing site condition claim was denied for lack of persuasive evidence of reliance where the evidence showed that the interpretation given by the contractor to contract documents pertaining to balanced earth work at a construction project was never actually relied upon by the contractor at the time of bidding.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

#### Intent of Parties

Appellant's allegation that it is entitled to equitable contract reformation fails as a matter of law. There was no mutual mistake in the formation of the road contract. Moreover, under the contract, appellant assumed all risks associated with its yard and pit.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### Labor Laws

For the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since the contractor, not the Government, is responsible for the conduct of its employees.

Appeals of Marc Industries, IBCA-2905, -2906, (Sept. 4, 1991) 98 I.D. 263

#### Third Persons

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

### CONTRACT DISPUTES ACT OF 1978

#### Jurisdiction

The Board is not deprived of jurisdiction over a contractor's appeals when the United States brings a civil action against appellant pursuant to the fraudulent claims provision of the Contract Disputes Act of 1978,

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

41 U.S.C. § 604, and the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988).

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Feb. 6, 1991) 98 I.D. 23

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

Certification of multiple claims by a division manager under a contract for the construction, inter alia, of a pumping plant is found to be inadequate for the purpose of vesting jurisdiction in the Board over the claims in issue where appellants assert that the division manager qualifies as a senior company official in charge at the contractor's plant or location involved but the evidence offered fails to establish that the division manager had primary responsibility for the execution of the contract and that he had a physical presence at the location of the primary contract activity.

Certification of multiple claims by an assistant vice president of a surety company that completed the contract work is found to be inadequate for the purpose of vesting the Board with jurisdiction over the claims in issue where appellants assert that the assistant vice president had authority to bind the surety company and

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

to certify the claims but make no attempt to show that the assistant vice president who certified the claimson behalf of the surety had overall responsibility for the conduct of the contractor's affairs in general.

In a case where appellants allude to subrogation claims but fail to identify or quantify them or to show that they were presented to the contracting officer for decision, the Board finds that it is without jurisdiction in the matter. The Board notes, however, that even if subrogation claims (properly certified, if required) cognizable as claims under the CDA had been presented to the contracting officer, appellant Federal, as surety, could only recover on such claims if it is shown that the obligations of its principal had been fully satisfied.

Where appellants assert that the completing surety should be recognized as the "contractor" by reason of a de facto takeover agreement but acknowledge that there was no formal takeover agreement and fail to point to any agreement with the Government following the contractor's default on which they rely as a takeover agreement, the Board finds that the surety is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist.

In addition to moving to dismiss the appeals by reason of improper certification, the Government has also moved to dismiss Federal as a party to the instant appeals on the ground that as a surety it is not a contractor within the meaning of sec. 601(4) of the CDA. Subject to proper certification of the claims upon resubmission thereof, the Board finds that the Government was aware of, assented to, and recognizaed the assignment and that the effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of the surety for the contractor, and

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

to give standing to the surety to prosecute the instant appeals in its own name as the "contractor" within the meaning of the CDA.

Besides moving to dismiss the instant appeals for lack of proper certification, the Government has also moved to dismiss two of the claims involved (captioned "Maladministration" and "Incidental Impact Expenses") on the ground that such claims were never presented to the contracting officer for decision. The Board finds, however, that the two claims in question were presented to and decided by the contracting officer and that subject to proper certification at the time of resubmission they may again be presented to the contracting officer in their present form for his consideration and decision.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

When, in submitting a claim to the contracting officer in excess of \$50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953 (Oct. 29, 1991) 98 I.D. 355

CONTRACTS--Continued

DISPUTES AND REMEDIES

Burden of Proof

A contractor was not entitled to a quantum adjustment for extra costs incurred for unanticipated borrow operations where the record established a strong inference that the contractor was itself responsible for most, if not all, factors that resulted in a shortfall of dirt on the project.

Where a contractor failed to establish a causal connection between alleged design deficiencies and the actual occurrence of additional costs, it was not entitled to an equitable adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

The Government has established that there are no material facts in dispute and that it is entitled to summary judgment on appellant's road contract claims.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

In an appeal prosecuted by a pro se appellant, a prima facie case of entitlement can be established through admissions of the Government, which establishment then shifts the burden of proof to the latter to disprove the appellant's case or to establish an affirmative defense. Unless the Government then carries the burden as to one or the other of those alternative bars to recovery, the appellant is entitled to recover. In a similar appeal where there are no Government admissions sufficient to establish appellant's prima facie case, the appellant's submission of mere allegations without proof thereof is not an adequate presentation on which to allow recovery, especially where the allegations,

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

even if accepted as proved, do not state a cognizable claim for recovery.

Appeals of Toland & Sons, IBCA-2716, -2717 (Aug. 7, 1991)

For the Government to be liable for extra hours worked by a janitorial contractor's workers, the contractor must prove that the changes were ordered or directed by the Government and that they were beyond the scope of the contract. Mere comments or suggestions to the workers by the contracting officer's representatives, and a referral of the resulting wage complaints to the Labor Department by the contracting officer, are insufficient to establish Government liability, since the contractor, not the Government, is responsible for the conduct of its employees.

Appeals of Marc Industries, IBCA-2905, -2906, (Sept. 4, 1991) 98 I.D. 263

Damages

Generally

A Government acknowledgment that the cost to terminate a contract, correct the specifications, and rebid the project would outweigh the cost of completing the work under the original contract, does not establish that the Government assumed the risk of substantial increased costs in order to complete the work. Where the work was not urgently needed, and there was no evidence that a substitute contractor could complete the work more expeditiously, the Board held that it would have been an abuse of discretion by the Government to default rather than

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Generally--Continued

consider the assessment of delay damages against the contractor.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

Measurement

In general, the measure of damages for the breach of a contract relating to Indian trust or restricted lands is that amount of money which will place the owner in as good a position as he would have been in had the contract been fully performed.

Under the doctrine of avoidable consequences, damages for breach of contract are normally not awarded to the nonbreaching party for those expenses which could have been avoided through the exercise of reasonable care. The doctrine does not, however, create enforceable rights in the breaching party.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't  
Portland Area Director, Bureau of Indian Affairs,  
21 IBIA 116 (Dec. 19, 1991)

Equitable Adjustments

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board

## CONTRACTS--Continued

### DISPUTES AND REMEDIES--Continued

#### Equitable Adjustments--Continued

adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

A contractor was not entitled to a quantum adjustment for extra costs incurred for unanticipated borrow operations where the record established a strong inference that the contractor was itself responsible for most, if not all, factors that resulted in a shortfall of dirt on the project.

A contractor is not entitled to impact and extended performance costs incurred as a result of winter damage to excavated roadbeds where the evidence shows that delays associated with the placing of protective aggregate base course, before the winter shutdown, did not arise from unforeseeable causes beyond the contractor's control and without its fault or negligence.

Where a contractor failed to establish a causal connection between alleged design deficiencies and the actual occurrence of additional costs, it was not entitled to an equitable adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

#### Extraordinary Remedies

Appellant's allegation that it is entitled to equitable contract reformation fails as a matter of law. There was mutual mistake in the formation of the road contract. Moreover, under the contract, appellant assumed all risks associated with its yard and pit.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction

The Board is not deprived of jurisdiction over a contractor's appeals when the United States brings a civil action against appellant pursuant to the fraudulent claims provision of the Contract Disputes Act of 1978, 41 U.S.C. § 604, and the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988).

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Harddrives, Inc., IBCA-2319 et al. (Feb. 6, 1991) 98 I.D. 23

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19,  
1991) 98 I.D. 253

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

When, in submitting a claim to the contracting officer in excess of \$50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953  
(Oct. 29, 1991) 98 I.D. 355

Substantial Evidence

Where an "as built" Government analysis of a shortfall of dirt on a construction project contained an estimated shrink factor that was excessive, the Board adopted a more reasonable shrink factor in order to calculate the extent of the contractor's quantum adjustment.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

## CONTRACTS--Continued

### DISPUTES AND REMEDIES--Continued

#### Termination for Default

##### Generally

A Government acknowledgment that the cost to terminate a contract, correct the specifications, and rebid the project would outweigh the cost of completing the work under the original contract, does not establish that the Government assumed the risk of substantial increased costs in order to complete the work. Where the work was not urgently needed, and there was no evidence that a substitute contractor could complete the work more expeditiously, the Board held that it would have been an abuse of discretion by the Government to default rather than consider the assessment of delay damages against the contractor.

Appeal of Gerald Miller Construction Co., IBCA-2292  
(Mar. 14, 1991)

## FEDERAL PROCUREMENT REGULATIONS

Regulations pertaining to the assignment of claims and contracts which are published in the Federal Register (e.g., one mandating the inclusion of an Assignment of Claims provision in any contract to be awarded) have the force and effect of law.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

## CONTRACTS--Continued

### FORMATION AND VALIDITY

#### Formalities

Regulations pertaining to the assignment of claims and contracts which are published in the Federal Register (e.g., one mandating the inclusion of an Assignment of Claims provision in any contract to be awarded) have the force and effect of law.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

#### Mistakes

A cadastral survey contractor is not entitled to an adjustment on the basis of mutual mistake merely because it is unable to meet its expected production rates. A party's prediction as to events that are to occur in the future, or his professional judgment, even if erroneous, is not a compensable mistake. In this case, there is insufficient evidence that the contemplated production rates could not have been achieved by a prudent contractor, and the fixed-price contract placed the risks of unexpected costs of performance on the contractor.

A contractor is not entitled to relief on a theory of constructive change where it failed to show that the Government directed it to perform work that was not required under the contract, or that the Government in any way changed the requirements of the contract after it was entered into.

Appeal of Ocean Technology, Inc., IBCA-2651 (Feb. 27, 1991)

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Mistakes--Continued

Appellant's allegation that it is entitled to equitable contract reformation fails as a matter of law. There was mutual mistake in the formation of the road contract. Moreover, under the contract, appellant assumed all risks associated with its yard and pit.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

INDIAN SELF-DETERMINATION AND EDUCATION  
ASSISTANCE ACT

Generally

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contract under the Act.

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

In connection with its authority to rescind an Indian Self-Determination Act contract under 25 U.S.C. § 450m (1988), the BIA has authority to investigate an Indian tribe's performance under the contract.

The BIA must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight responsibilities under the Indian Self-Determination Act.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

## CONTRACTS--Continued

### PERFORMANCE OR DEFAULT

#### Generally

In a contract for the provision of an airplane and pilot throughout a mandatory availability period, the Board held that the Government could not use the general default clause as the sole authority on which to base a termination accomplished 23 minutes after the appointed commencement of performance time when the contract also contained a special default clause which established 3 consecutive days of unavailability as "grounds for termination" under the general clause.

Appeal of Pegasus Helicopters, Inc., IBCA-2671 (Mar. 6, 1991)

#### Compensable Delays

The Board found the Government did not delay in rejecting appellant's nonconforming work and, even if it had, any Governmental delay would have been concurrent with the contractor's delay in meeting in-place testing requirements and not compensable.

Appeal of White & McNeil Excavating, Inc., IBCA-2448 (Nov. 4, 1991) 98 I.D. 359

### RULES OF PRACTICE

#### Motions

The Government has established that there are no material facts in dispute and that it is entitled to summary judgment on appellant's road contract claims.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

## CONVEYANCES

### INTEREST CONVEYED

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to

CONVEYANCES--Continued

INTEREST CONVEYED--Continued

show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

RESERVATIONS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

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Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

## CONVEYANCES--Continued

### RESERVATIONS AND EXCEPTIONS

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

## COURTS

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

## DELEGATION OF AUTHORITY

(See also Administrative Authority, Contracts)

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

## DESERT LAND ENTRY

### CANCELLATION

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey,  
121 IBLA 218 (Nov. 13, 1991)

### EXTENSION OF TIME

In order to obtain an extension of time for the submission of final proof of a desert land entry, the entryman must show that the failure to reclaim the land within the entry during the statutory life of the entry was due, without fault on the entryman's part, to unavoidable delay in the construction of the necessary irrigation works. Where the entryman establishes that financial institutions were unwilling to lend money because of the inability of BLM to patent the land due to the existence of a Federal Court injunction, the entryman may be granted an extension of time to make the final proof, as provided by 43 U.S.C. § 333 (1988).

Roseanne M. Bell et al., 120 IBLA 153 (July 16, 1991)

### FINAL PROOF

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has

DESERT LAND ENTRY--Continued

FINAL PROOF--Continued

not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey,  
121 IBLA 218 (Nov. 13, 1991)

WATER RIGHT

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey,  
121 IBLA 218 (Nov. 13, 1991)

WATER SUPPLY

BLM properly cancels a desert land entry where the entryman has voluntarily granted an option to acquire the water rights submitted as the source of water for his entry and has presented no evidence of some other permanent source of water for the entry. Cancellation of the entry is appropriate even though the option has not been exercised and the events which render the option operative have not occurred.

Harry Gray Browne, Franklyn D. Jeans, Carl W. Rimbey,  
121 IBLA 218 (Nov. 13, 1991)

## ENDANGERED SPECIES ACT OF 1973

### SECTION 7

#### Generally

The absence of a biological opinion from the Fish and Wildlife Service under authority of sec. 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1988), does not preclude BLM from denying a permit for a motorcycle race when the denial is based on an environmental assessment showing that the anticipated impacts of the race, including cumulative impacts from holding the race in previous years, are unacceptably detrimental to a threatened species and its habitat.

American Motorcycle Ass'n, District 37, 119 IBLA 196 (May 7, 1991)

#### Consultation

A decision denying a protest of a timber sale on the ground that BLM need not consult with FWS under sec. 7 of the ESA, 16 U.S.C. § 1536 (1988), when salvaging timber downed by a windstorm may be affirmed where the record fails to demonstrate that harvest plan features may affect the northern spotted owl.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

#### Mitigation

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when

ENDANGERED SPECIES ACT OF 1973--Continued

SECTION 7--Continued

Mitigation--Continued

it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

ENVIRONMENTAL POLICY ACT

(See also National Environmental Policy Act of 1969)

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case

ENVIRONMENTAL POLICY ACT--Continued

that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by 42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially

ENVIRONMENTAL POLICY ACT--Continued

significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to disclose any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide

#### ENVIRONMENTAL POLICY ACT--Continued

no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

#### ENVIRONMENTAL QUALITY

(See also Water Pollution Control)

##### ENVIRONMENTAL STATEMENTS

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

## ENVIRONMENTAL QUALITY--Continued

### ENVIRONMENTAL STATEMENTS--Continued

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by 42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

BLM is responsible for administering the public lands and it must be accorded the discretion necessary effectively to discharge that duty. Where a BLM decision to rehabilitate the Spanish Ridge Road within the King Range National Conservation Area is based on a consideration of all relevant factors, and is supported by the record, which includes an environmental assessment, it may not be overcome by a mere statement of a

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

difference of opinion regarding the necessity for and effect of such action.

William R. Franklin, Linda Smith Franklin, 121 IBLA 37  
(Oct. 16, 1991)

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to disclose any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA  
347 (Dec. 17, 1991)

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely

## ENVIRONMENTAL QUALITY--Continued

### ENVIRONMENTAL STATEMENTS--Continued

similar to one which normally requires the preparation of an EIS.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

## EQUAL ACCESS TO JUSTICE ACT

### ADVERSARY ADJUDICATION

Under the EAJA, 5 U.S.C. § 504 (1988), and 43 CFR 4.603, an adversary adjudication is one required by statute to be determined on the record after an opportunity for an agency hearing in accordance with 5 U.S.C. § 554 (1988). Where the Board of Land Appeals orders a hearing in an omitted lands survey case, in accordance with 43 CFR 4.415, such a proceeding is not an adversary adjudication within the meaning of the EAJA and 43 CFR 4.603.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

### APPLICATION

The Department's regulations implementing the EAJA provide a two-tier adjudicatory procedure in which an application for an award of fees and expenses is filed with the adjudicative officer who presided at the adversary adjudication, and the decision of that officer on the application is then appealable to the appropriate appeals board. When an application is filed in the first instance with the Board of Land Appeals, it will ordinarily be transferred to the appropriate adjudicative officer; however, where, as a matter of law, the application must be denied, the Board may adjudicate the

## EQUAL ACCESS TO JUSTICE ACT--Continued

### APPLICATION--Continued

application, since transfer of the application would serve no useful purpose.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

## CONTRACT DISPUTES ACT OF 1978

### Allowable Expenses

Under the EAJA, a pro se applicant may recover "expenses," which is defined by the Federal Circuit to include "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are customarily charged to the client where the case is filed." Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987).

A contractor was allowed to recover attorney fees and expenses for out-of-state counsel under an EAJA application, despite the Government's position that the fees be disallowed as the contractor could have retained an attorney located closer to its place of business. The Board rejected the Government's argument, concluding that it would impair a party's right to competent counsel of its choice.

When attorney fees were actually billed at the statutory maximum rate of \$75 per hour in accordance with the EAJA, the Board made no distinction between the hourly rate charged for partner or associate time. Otherwise, associate attorney time was allowed at the lower rate billed the applicant.

Attorney fees and expenses incurred by an applicant as a result of a change in law firms were found to be reasonable under an EAJA application, when the evidence showed that the legal services provided by the second

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Allowable Expenses--Continued

firm were not duplicative of the first and were in connection with the underlying adjudication.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

Application and Jurisdiction

Absent a motion for reconsideration or an appeal to the Federal Circuit, under the EAJA an applicant has 150 days from receipt of the Board's decision or order dismissing the appeal to file a request for attorney fees and expenses.

An EAJA application for attorney fees and expenses arising out of a CDA adjudication is not governed by the procedural requirements of 43 CFR Part 4.6 of the Departmental regulations, which apply to certain "adversary adjudications conducted by the Secretary under 5 U.S.C. § 554" (Administrative Procedures Act). CDA appeals are not pursuant to the Administration Procedures Act, nor conducted by the Secretary. Thus, a contractor's EAJA application was found to meet all EAJA eligibility requirements, although it did not satisfy the more stringent rules set forth in the Part 4.6 regulations.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Substantially Justified

A construction contractor's application under the EAJA for an award of attorney fees and expenses was granted, because the Government's position in the underlying adjudication lacked substantial justification. Under the EAJA, "substantial justification" means more than merely the existence of a colorable legal basis for the Government's case. The Government must show its position to be "clearly reasonable," which it failed to do.

Application of White Buffalo Construction, Inc., for Fees & Expenses Under EAJA, IBCA-2918-F, -2919-F (Aug. 2, 1991)

ESTOPPEL

Silence by Departmental officials cannot support a claim of estoppel against the Department. Where officials of BLM issued a notice of drainage to an operator in 1982, but took no further action to enforce the notice until 1985, the Department was not estopped to assess compensatory royalty.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in U.S. v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct. The existence of a crucial misstatement of material fact upon which another party relied to its

ESTOPPEL--Continued

asserted detriment is a prerequisite to the invocation of estoppel.

United States v. Willie White et al., 118 IBLA 266  
(Mar. 12, 1991) 98 I.D. 129

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

While situations may arise where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been obtained, the Government can never be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

## EVIDENCE

### GENERALLY

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existence and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management,  
118 IBLA 38 (Feb. 21, 1991)

### BURDEN OF PROOF

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

Implementation of the Act of Sept. 1, 1937 (Reindeer Industry Act), is committed to the discretion of the Secretary of the Interior, as delegated to BLM. Where, as required by 43 CFR 4310.1, BLM rejects the application for reindeer grazing privileges only after consulting with the Alaska Department of Fish and Game, which also expressly opposes approval, and where the

EVIDENCE--Continued

BURDEN OF PROOF--Continued

applicant fails to show error in BLM's and ADF&G's findings, BLM's decision is properly affirmed on appeal.

Donald C. Olson, 120 IBLA 166 (July 22, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton,  
9 OHA 108 (Nov. 12, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error

## EVIDENCE--Continued

### BURDEN OF PROOF--Continued

in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

### HEARSAY

Hearsay evidence is admissible in an administrative proceeding if it is relevant and material, and may constitute "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) (1988), if it is reliable and probative. A multifactor analysis is used to assure reliability when hearsay evidence is the sole basis for agency action, and a decision by an Administrative Law Judge is properly reversed if the resolution of a dispositive issue is based solely on hearsay evidence that fails to satisfy the required analysis.

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

### PREPONDERANCE

If a lessee contends that a prudent operator would not have drilled a protective well in 1982 because it would not have been profitable, to prevail, the lessee must also prove by a preponderance of evidence that a protective well drilled in 1982 would not then have been profitable.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

## EVIDENCE--Continued

### PRESUMPTIONS

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

### STIPULATIONS

A stipulation is a contract and should be read as a whole in a manner which gives a reasonable meaning to all of its provisions and leaves none of them superfluous. Where a particular interpretation of isolated provisions of a stipulation would negate other provisions, it may be concluded that such an interpretation was not intended by the parties.

Exxon Corp., et al. v. Bureau of Land Management, 118 IBLA 38 (Feb. 21, 1991)

### SUFFICIENCY

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a

## EVIDENCE--Continued

### SUFFICIENCY--Continued

situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Vickie L. Fontenot, Allen J. Fontenot, Jr., 120 IBLA 47 (Oct. 22, 1991)

## EXCHANGES OF LAND

(See also Indians, Private Exchanges, State Exchanges, Wildlife Refuges & Projects)

### GENERALLY

BLM properly denies a protest of a proposed exchange of public for private land where the protestant fails to establish that BLM did not properly consider any relevant factor bearing on whether the exchange would be in the public interest.

BLM's appraisal of the value of the land to be involved in an exchange pursuant to sec. 206 to FLPMA, as amended, 43 U.S.C. § 1716 (1988), will not be overturned where the protestant fails to submit any evidence of a contrary value or that BLM erred in its appraisal method or results.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

## EXCHANGES OF LAND--Continued

### GENERALLY--Continued

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

The fluctuation in value and addition of lands to equalize values are contemplated by the statutory exchange program by the original Notice of Realty Action published by BLM. Such fluctuations are acceptable provided: (1) they are predicated upon appraisals updated in a manner consistent with the Uniform Appraisal Standards for Federal Land Acquisitions; and (2) the equalizing monetary payment does not exceed 25 percent of the value of the public lands and other interests being conveyed at the time of the exchange.

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

## EXCHANGES OF LAND--Continued

### GENERALLY--Continued

BLM has no authority to approve a proposed partial exchange independent of review of the non-Federal lands to be acquired.

Sierra Club, Utah Chapter, 120 IBLA 347 (Sept. 13, 1991)

### FOREST EXCHANGES

Lands conveyed to the United States under 16 U.S.C. § 485 (1988), become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. Forest Service documents indicate that authority to accept title to exchanged land has been delegated to the Regional Forester. It is therefore the date the Regional Forester or his authorized designee accepts title which determines when exchanged land is subject to location of mining claims.

Robert N. Shanahan et al., 120 IBLA 187 (July 29, 1991)

## FEDERAL EMPLOYEES AND OFFICERS

(See also Administrative Authority, Claims Against the United States, Officers & Employees)

### AUTHORITY TO BIND GOVERNMENT

Silence by Departmental officials cannot support a claim of estoppel against the Department. Where officials of BLM issued a notice of drainage to an operator in 1982, but took no further action to enforce the notice until 1985, the Department was not estopped to assess compensatory royalty.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

Unauthorized acts of a BIA employee cannot serve as the basis for conferring rights not authorized by law.

D. G. & D. Logging Co. v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 229 (Aug. 29, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976  
(See also Hearings, Rights-of-Way)

GENERALLY

A right-of-way grant for a water pipeline issued in 1990 pursuant to regulations published at 43 CFR Part 2800, implementing the Federal Land Policy and Management Act of 1976, was made subject to payment of rental under 43 CFR 2803.1-2(a).

Kevin C. Kehoe, 119 IBLA 257 (May 16, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALLY--Continued

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

Where the current fair market value of a cabin site has been determined in accordance with accepted appraisal procedures and appellant fails to establish by positive, substantial evidence that the appraisal is in error, adjustment of the annual rental to the current fair market value rental will be affirmed.

Norman P. Steiner, William A. Phillips, M.D., Gloria M. Williams, Robert A. Smith, & Grace E. Fullerton, 9 OHA 108 (Nov. 12, 1991)

The O&C Act makes clear that the primary use of O&C lands is for timber production to be managed in conformity with the principle of sustained yield. BLM did not err in construing the O&C Act as establishing timber production as the dominant use, notwithstanding the provisions of FLPMA calling for multiple use.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

ASSESSMENT WORK

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

ASSESSMENT WORK--Continued

Under 43 U.S.C. § 1744 (1988), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim. An unpatented mining claim is not exempt from the filing requirement when the estate of the owner is in probate.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

CONVEYANCES

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CONVEYANCES--Continued

show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

EXCHANGES

BLM properly denies a protest of a proposed exchange of public for private land where the protestant fails to establish that BLM did not properly consider any relevant factor bearing on whether the exchange would be in the public interest.

BLM's appraisal of the value of the land to be involved in an exchange pursuant to sec. 206 to FLPMA, as amended, 43 U.S.C. § 1716 (1988), will not be overturned where the protestant fails to submit any evidence of a contrary value or that BLM erred in its appraisal method or results.

Burton A. & Mary H. McGregor et al., 119 IBLA 95  
(Apr. 15, 1991)

The fluctuation in value and addition of lands to equalize values are contemplated by the statutory exchange program by the original Notice of Realty Action published by BLM. Such fluctuations are acceptable provided: (1) they are predicated upon appraisals updated in a manner consistent with the Uniform Appraisal Standards for Federal Land Acquisitions; and (2) the equalizing monetary payment does not exceed 25 percent of the value of the public lands and other interests being conveyed at the time of the exchange.

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

BLM has no authority to approve a proposed partial exchange independent of review of the non-Federal lands to be acquired.

Sierra Club, Utah Chapter, 120 IBLA 347 (Sept. 13, 1991)

GRAZING LEASES AND PERMITS

A decision by BLM to grant a sheep grazing application subject to restrictions in order to facilitate multiple-use management objectives by keeping a portion of an allotment off limits to domestic sheep so that it might be available for the introduction of bighorn sheep, will not be disturbed absent substantial evidence showing that the decision is improper.

Joe Saval Co. v. Bureau of Land Management, State of Nevada, Department of Wildlife (Intervenor), 119 IBLA 202 (May 7, 1991)

## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

### LAND-USE PLANNING

A tract of public land may be sold only where, as a result of land-use planning under 43 U.S.C. § 1712 (1988), the Secretary determines that the sale meets one of the criteria of 43 U.S.C. § 1713(a) (1988). When a tract is nominated to be offered for sale under 43 CFR 2710.0-6(b) but the proposed sale does not conform to the existing land-use planning document, the proposed sale must be considered in accordance with either plan amendment or planning analysis procedures.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

### LEASES

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including the development of small trade or manufacturing concerns. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market value for a commercial-use lease will not be set aside on appeal if appellant fails to show error in the appraisal method used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

A decision determining back rental for a period of unauthorized use of a site used as an oil well servicing facility will be set aside and remanded where the record fails to establish how BLM arrived at the determination of past annual fair market rental value.

Sierra Production Service, 118 IBLA 259 (Mar. 11, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LEASES--Continued

Sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including agriculture. 43 CFR 2920.0-6(a) requires that land-use authorizations be issued only at fair market value. An appraisal of fair market rental value for an agricultural lease will be affirmed on appeal where an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Russell A. Beaver, J. F. Beaver, 121 IBLA 386 (Dec. 26, 1991)

MINERAL REVENUES

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

PERMITS

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309 (Jan. 23, 1991)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

American Motorcycle Ass'n, District 37, 119 IBLA 196 (May 7, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

PLAN OF OPERATIONS

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

PUBLIC PARTICIPATION

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM

Unpatented mining claims located on land conveyed to Doyon, Ltd., an Alaska Native corporation, pursuant to provision of sec. 22 of ANCSA, may no longer be administered by the Department, because the filing and recording provisions of sec. 314 of FLPMA apply only to public lands of the United States and do not permit continued administration of lands conveyed out of Federal ownership.

Margaret L. Mespelt & Theodore J. Almasy, 118 IBLA 60  
(Feb. 21, 1991)

As a general rule, where BLM's records do not contain evidence that one of the two documents required to be filed by sec. 314 of FLPMA has been filed for each unpatented mining claim within the prescribed filing period, the claims will be properly declared abandoned and void. However, where a claimant submits a certified mail receipt proving that a document was in fact received by the proper BLM office within the prescribed time period, and where there is no evidence that the claimant filed any other document with BLM on that date, the presumption of nonfiling is rebutted. Where an appellant alleges that he timely mailed the required documents to the correct BLM office and supplies the Board with a copy of a certified mail receipt indicating that an agent of the "US Dept. of the Interior" received documents from him on Dec. 15, 1986, and where BLM is unable to certify that this card does not indicate that it received the documents as alleged by appellant, BLM's decision declaring the claims abandoned and void for failure to make timely filing will be reversed.

Paul & Sandra Harvey, 119 IBLA 25 (Mar. 19, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

An affidavit of labor was timely received by BLM pursuant to 43 CFR 3833.0-5(m) when it was received before Jan. 19, after it had been sent to BLM in an envelope postmarked prior to Dec. 31 of the preceding year.

Joe H. Vozza, 121 IBLA 370 (Dec. 19, 1991)

RECORDATION OF MINING CLAIM CERTIFICATES OR  
NOTICES OF LOCATION

The Federal Land Policy and Management Act of 1976 requires the owner of a mining claim located on public land to file with the proper BLM office a copy of the official record of the notice or certificate of location within 90 days after the date of location. 43 U.S.C. § 1744(b) (1988). The "date of location" of a mining claim is the date determined under state law in the jurisdiction in which the mining claim is situated. 43 CFR 3833.0-5(h). Under Nevada law the date a mining claim is located is the date which is stated in the notice of location posted on the claim and repeated in the certificate of location filed with the county recorder. Upon a failure to timely file a copy of the notice of location with BLM, a claim is conclusively deemed abandoned and void.

Richard Bargaen, 117 IBLA 239 (Jan. 3, 1991)

Under 43 U.S.C. § 1744 (1988), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim. An unpatented mining claim is

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIM CERTIFICATES OR  
NOTICES OF LOCATION--Continued

not exempt from the filing requirement when the estate of the owner is in probate.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

Under 43 U.S.C. § 1744 (1988), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file a copy of the official record of the notice or certificate of location with BLM on or before Oct. 22, 1979, and failure to do so constituted an abandonment of the claim by the owner.

A BLM decision notifying the occupant of public land of the initiation of trespass proceedings and requiring the removal of unauthorized property, based on the fact that the holder of a life estate occupancy lease for the land in question had relinquished the lease, will be set aside where the record shows that the land was the subject of a mining claim properly recorded with BLM in 1982 and questions exist regarding present ownership of the claim and whether occupancy of the claim is reasonably incident to mining.

Mr. & Mrs. Michael Bosch, 119 IBLA 370 (June 26, 1991)

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY

A BLM increase in the annual rental charge for a communications site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market value of the right-of-way by the comparable lease method of appraisal.

Questar Service Corp., 119 IBLA 65 (Mar. 29, 1991)

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A right-of-way grant for a water pipeline issued in 1990 pursuant to regulations published at 43 CFR Part 2800, implementing the Federal Land Policy and Management Act of 1976, was made subject to payment of rental under 43 CFR 2803.1-2(a).

Kevin C. Kehoe, 119 IBLA 257 (May 16, 1991)

Although 43 CFR 2801.1-2 authorizes BLM to require that a road right-of-way applicant grant a reciprocal right-of-way to the United States as a condition to receiving a right-of-way pursuant to sec. 501(a) of FLPMA, 43 U.S.C. 1761(a) (1988), the reciprocal grants must be equivalent, and a BLM decision denying an application for the assignment of a road right-of-way, based on the purported refusal of the assignee to grant public access across his private land, will be vacated because a FLPMA right-of-way does not grant public access.

Charles Ryden, 119 IBLA 277 (June 6, 1991)

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

AMAX Magnesium, 119 IBLA 281 (June 6, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240  
(Aug. 9, 1991)

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEI, Inc., 120 IBLA 266 (Aug. 21, 1991)

BLM properly declines to condition a grant of a slurry pipeline right-of-way on a requirement that the pipeline be operated as a common carrier for the benefit of other producers of phosphate ore where no statute requires such operation and there is no demonstration that such a condition is necessary to protect competition, future development of phosphate reserves, or the environment.

John D. Archer, 120 IBLA 290 (Sept. 6, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

BLM's decision approving proposed temporary rights-of-way pending consummation of an exchange is properly vacated in part when it provides no term in the event the exchange is not consummated.

Sierra Club, Utah Chapter, 120 IBLA 347 (Sept. 13, 1991)

It is proper for BLM to cancel a reservoir right-of-way grant pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1766 (1988), when the grantee fails to obtain a performance bond required by the grant, after having been given notice and a reasonable time to comply.

Robert A. Erkins, 121 IBLA 61 (Oct. 25, 1991)

A decision rejecting a right-of-way application for an access road will be affirmed where granting the right-of-way would be inconsistent with applicable law and not in the public interest. Application for an access road right-of-way was properly rejected where the water well to which access was sought was neither the subject of an approved mining plan of operations nor authorized through issuance of a right-of-way grant or temporary use permit.

George Bernadot, 121 IBLA 138 (Oct. 28, 1991)

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

The holder of a right-of-way grant for a salt water disposal site is required to pay annually, in advance, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. In accordance with 43 CFR 2803.1-2(c)(3)(i), rental for non-linear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels.

A BLM decision adjusting the rental for a salt water disposal site right-of-way from a per acre fee to a fee per barrel of disposed water will be affirmed where the adjusted rental is based on a market survey of comparable salt water disposal leases which indicates that a per barrel fee is utilized in the market place to determine rentals, and the appellant has neither demonstrated error in that methodology nor shown that the rental charges are excessive.

Laguna Gatuna, Inc., 121 IBLA 302 (Dec. 3, 1991)

## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

### RULES AND REGULATIONS

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

### SALES

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

Under sec. 203(a)(3) of FLPMA and 43 CFR 2710.0-3(a)(2), BLM is authorized to sell a tract of public lands where, as a result of land-use planning, it determines that disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values. A decision to proceed with a sale to a county of public lands abutting its existing solid waste disposal facility will be set aside and the case remanded for further consideration where there is a comparably sized parcel of private land for sale that also abuts the existing facility, and where BLM has made no showing that the expansion of the county's facility could not be achieved prudently or feasibly by its acquiring the private land.

A tract of public land may be sold only where, as a result of land-use planning under 43 U.S.C. § 1712 (1988), the Secretary determines that the sale meets one of the criteria of 43 U.S.C. § 1713(a) (1988). When a tract is nominated to be offered for sale under 43 CFR

## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

### SALES--Continued

2710.0-6(b) but the proposed sale does not conform to the existing land-use planning document, the proposed sale must be considered in accordance with either plan amendment or planning analysis procedures.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

### SURFACE MANAGEMENT

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

### WILDERNESS

In order to demonstrate error in a BLM decision to eliminate an inventory unit from further consideration as a wilderness study area pursuant to secs. 201 and 603 of FLPMA, 43 U.S.C. §§ 1711 and 1782 (1988), an appellant must point out not only that BLM failed to follow proper procedures but also that the record does not support BLM's substantive conclusions and that a different determination might result from reassessment.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

such judgments may not be overcome simply by expressions of disagreement.

Neither NEPA, 42 U.S.C. § 4332 (1988), nor the Endangered Species Act, 16 U.S.C. § 1536 (1988), contains directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation is conducted pursuant to relevant provisions of FLPMA and the Wilderness Act.

The Wilderness Society et al., 119 IBLA 168 (May 1, 1991)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

WITHDRAWALS

Where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and, further, that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by a public land order issued by the Secretary.

Richard Bargaen, 117 IBLA 239 (Jan. 3, 1991)

## FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

### ASSESSMENTS

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGDMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

### CIVIL PENALTIES

Assessments for the nonreporting and late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of FOGDMA, 30 U.S.C. § 1719 (1988), and are not subject to the procedures required by that section.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES

MMS' Procedure Paper concerning valuation of NGLP for royalty purposes was not required to be promulgated as a regulation because it does not constitute a substantive rule of law, as it neither creates law nor changes established policy. Rather, it simply clarifies the methodology for applying the factors set forth in 30 CFR 206.150 (1985), providing internal guidance for how this authority should be exercised.

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

Where more than 6 years have passed between the payment of Federal oil and gas royalty (and the generation of relevant documentation concerning the royalty) and the institution of an audit concerning the timeliness of the royalty payments, the time for the lessee to maintain records concerning the royalty has expired under 30 U.S.C. § 1713(b) (1988).

Where a lessee's successor in interest asserts that a lessee's admitted late payment of royalty was excused because the lessee was unaware that royalty in kind was no longer being taken and that royalty in value payments were therefore due, but the Government is able to show by contemporary evidence that the lessee did receive timely notice of the termination of the royalty in kind contract, MMS' decision imposing late payment charges for the lessee's failure to pay royalty timely is properly affirmed.

Marathon Oil Co., 119 IBLA 345 (June 18, 1991)

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co.,  
121 IBLA 278 (Nov. 19, 1991)

FEES

(See also Accounts)

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309  
(Jan. 23, 1991)

#### GEO THERMAL LEASES

(See also Hearings, Mineral Leasing Act)

##### GENERALLY

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

##### ASSIGNMENTS OR TRANSFERS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

##### LANDS SUBJECT TO

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

## GEOTHERMAL LEASES--Continued

### PATENTED OR ENTERED LANDS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

### RENTALS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Because BLM had no authority to accept rental payment for land within a geothermal lease over which it had no jurisdiction, it was obliged to refund to the lessee any excess payment.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

### GRAZING AND GRAZING LANDS

Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly

GRAZING AND GRAZING LANDS--Continued

defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

GRAZING LEASES

(See also Taylor Grazing Act)

GENERALLY

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

## GRAZING LEASES--Continued

### APPORTIONMENT OF LAND

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Holders of existing permanent grazing preference rights who seek increased grazing preferences must show that sufficient forage exists to support the requested increases. Generally, to be allowed, such increases must be supported by continuing rangeland studies.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

### CANCELLATION OR REDUCTION

A decision that denied grazing lessees increased preferences because adequate data was not available to support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

### PREFERENCE RIGHT APPLICANTS

A decision that denied grazing lessees increased preferences because adequate data was not available to

## GRAZING LEASES--Continued

### PREFERENCE RIGHT APPLICANTS--Continued

support the increases sought was not shown to be irrational so as to require reversal because the decision-maker chose to reject data gathered by a preliminary study using discredited sampling methods.

Holders of existing permanent grazing preference rights who seek increased grazing preferences must show that sufficient forage exists to support the requested increases. Generally, to be allowed, such increases must be supported by continuing rangeland studies.

Robert E. Miller, Jr., & Donald E. Rowlett v. Bureau of Land Management, 118 IBLA 354 (Mar. 14, 1991)

## GRAZING PERMITS AND LICENSES

(See also Appeals, Hearings, Taylor Grazing Act)

### GENERALLY

A decision by BLM to grant a sheep grazing application subject to restrictions in order to facilitate multiple-use management objectives by keeping a portion of an allotment off limits to domestic sheep so that it might be available for the introduction of bighorn sheep, will not be disturbed absent substantial evidence showing that the decision is improper.

Joe Saval Co. v. Bureau of Land Management, State of Nevada, Department of Wildlife (Intervenor), 119 IBLA 202 (May 7, 1991)

## GRAZING PERMITS AND LICENSES--Continued

### GENERALLY--Continued

Implementation of the Act of Sept. 1, 1937 (the Reindeer Industry Act) is committed to the discretion of the Secretary of the Interior. When BLM rejects an application for a reindeer grazing permit after consulting with the Alaska Dept. of Fish and Game, which opposes approval, and the applicant fails to show error in BLM's findings or an abuse of discretion, BLM's decision is properly affirmed on appeal.

Thomas L. Gray, 121 IBLA 295 (Dec. 3, 1991)

### ADMINISTRATIVE LAW JUDGE

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

## GRAZING PERMITS AND LICENSES--Continued

### APPEALS

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

GRAZING PERMITS AND LICENSES--Continued

CANCELLATION OR REDUCTION

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

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Under 43 CFR 2201.1(c) the publication of a notice of realty action constitutes the notice to grazing permittees and lessees required by 43 CFR 4110.4-2(b).

A grazing permittee received the regulatory 2-year notice when, subsequent to receipt of an allegedly defective notice, the permittee was served with a copy of the notice of realty action.

City of Santa Fe et al. (On Judicial Remand), 120 IBLA 308 (Sept. 11, 1991)

#### HEARINGS

(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Mining Control & Reclamation Act of 1977, Surface Resources Act, Water Pollution Control)

Where the record on appeal presents unresolved questions of fact or undecided, significant legal issues, under 43 CFR 4.415 the Board of Land Appeals has discretionary authority to refer the matter for a hearing.

Jerome P. McHugh & Associates (On Reconsideration),  
117 IBLA 303 (Jan. 17, 1991)

A second hearing will not be afforded if an appellant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

The Board of Indian Appeals will not refer a case for an evidentiary hearing pursuant to 43 CFR 4.337(a) when the resolution of the factual disputes is not necessary for disposition of the case.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

#### HEARINGS--Continued

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

#### INDIAN PROBATE

(See also Appeals, Bureau of Indian Affairs, Hearings, Indians, Rules of Practice)

#### ADMINISTRATIVE LAW JUDGE

##### Authority

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION)

Generally

Duly promulgated Departmental regulations provide parties to an Indian probate proceeding with a right to appeal to the Board of Indian Appeals. An Indian probate Administrative Law Judge lacks authority to restrict or cut off that right of appeal by saying that his or her orders are final.

Estate of Henry Houle, 19 IBIA 222 (Feb. 12, 1991)

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Jerry Elmer Coppock, 20 IBIA 212 (Aug. 22, 1991)

BUREAU OF INDIAN AFFAIRS

Generally

The Secretary of the Interior is authorized to waive use of funds in Individual Indian Money accounts to satisfy indebtedness of Indians to the United States resulting from errors in recording Indian probate distributions.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 163 (Aug. 13, 1991)

INDIAN PROBATE--Continued

HEARING (See also ADMINISTRATIVE PROCEDURE,  
REHEARING)

Notice

Although there is a presumption that notice sent to a party at his or her last known address and not returned has been received, when the party shows that the address used was not his or her correct current address and specifically contests receiving notice, the presumption cannot operate to prove receipt of notice.

Estate of Rose Hyson Hardick Sparlin, 19 IBIA 153  
(Jan. 11, 1991)

INDIAN LAND CONSOLIDATION ACT

Escheat

Where Congress, in amending an existing statutory provision, indicates an intent to clarify that provision, the amendment and its legislative history may be used in construing the original enactment.

Interests subject to the escheat provision in 25 U.S.C. § 2206(a) (1988), escheat only to the tribe with governmental jurisdiction over the reservation or off-reservation area in which the interests are located.

Estate of Peter Alvin Ward, 19 IBIA 196 (Feb. 5, 1991)  
98 I.D. 14

INDIAN PROBATE--Continued

INVENTORY (See also MODIFICATION OF INVENTORY)

Property Erroneously Excluded or Included

Corrections to inventories in Indian estates may not be pursued through administrative appeals of unrelated BIA decisions.

Georgianna L. Danks v. Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 79 (June 12, 1991)

NOTICE OF HEARING

Generally

Although there is a presumption that notice sent to a party at his or her last known address and not returned has been received, when the party shows that the address used was not his or her correct current address and specifically contests receiving notice, the presumption cannot operate to prove receipt of notice.

Estate of Rose Hyson Hardick Sparlin, 19 IBIA 153 (Jan. 11, 1991)

Under 43 CFR 4.211(a), constructive notice of an Indian probate hearing can be given through posting in the vicinity of the hearing. In order to find that a person received constructive notice through posting, and thus lacks standing to petition for reopening under 43 CFR 4.242(h), the probate record must show that the notices were properly posted in accordance with the regulation.

Estate of Jack Kenworthy, 21 IBIA 4 (Oct. 4, 1991)

## INDIAN PROBATE--Continued

### REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING)

#### Generally

Under 43 CFR 4.241(b), an Administrative Law Judge must deny a petition for rehearing that is not properly filed with the Superintendent.

Estate of Peter Joseph Chalwain, 20 IBIA 128 (July 21, 1991)

#### Renunciation

Under 43 CFR 4.208, a devisee or heir cannot renounce an interest in trust or restricted property in favor of a particular person or persons. Rather, the interest renounced passes as if the person renouncing predeceased the decedent.

Estate of Gus Four Eyes, Jr., aka Gilford Fireshaker, 20 IBIA 22 (May 6, 1991)

### REOPENING

#### Standing to Petition for Reopening

Under 43 CFR 4.211(a), constructive notice of an Indian probate hearing can be given through posting in the vicinity of the hearing. In order to find that a person received constructive notice through posting, and thus lacks standing to petition for reopening under 43 CFR 4.242(h), the probate record must show that the notices were properly posted in accordance with the regulation.

Estate of Jack Kenworthy, 21 IBIA 4 (Oct. 4, 1991)

## INDIAN PROBATE--Continued

### REPRESENTATION

An individual participating in a Departmental Indian probate proceeding without an attorney is still required to raise all issues and arguments at the hearing.

Estate of Gus Four Eyes, Jr., aka Gilford Fireshaker,  
20 IBIA 22 (May 6, 1991)

### WILLS (See also CONTRACT TO MAKE WILL, INHERITING)

#### Testamentary Capacity

##### Generally

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

Evidence that an Indian decedent has been a patient at a mental hospital or has taken medication for a mental condition is insufficient to establish that the decedent lacked the requisite testamentary capacity at the time she executed her will.

Estate of Johanna Small Rib (Standing Twenty), 19 IBIA  
236 (Feb. 20, 1991)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING)  
--Continued

Testamentary Capacity--Continued

Generally--Continued

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205  
(Aug. 21, 1991)

Undue Influence

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will on the grounds of undue influence, it must be shown: (1) that the decedent was susceptible of being dominated by another; (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling her mind and actions; (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Johanna Small Rib (Standing Twenty), 19 IBIA  
236 (Feb. 20, 1991)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING)  
--Continued

Undue Influence--Continued

To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires.

When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205 (Aug. 21, 1991)

INDIANS

(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate)

GENERALLY

The Board of Indian Appeals will not refer a case for an evidentiary hearing pursuant to 43 CFR 4.337(a) when the resolution of the factual disputes is not necessary for disposition of the case.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

INDIANS--Continued

GENERALLY--Continued

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

Doubtful or ambiguous expressions in statutes enacted for the benefit of Indians must be interpreted in favor of the Indians.

In interpreting a statute that attempts to address two conflicting Federal policies, the BIA must be cognizant of the inherent tension within the statute.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

Bob Begay v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 248 (Sept. 20, 1991)

In exercising the authority of the Secretary of the Interior to review decisions issued by officials of the BIA, the Board of Indian Appeals is not limited by the standards of review set forth in the APA, 5 U.S.C. § 706

## INDIANS--Continued

### GENERALLY--Continued

(1988), for review of agency decisionmaking by the Federal courts.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs,  
21 IBIA 24 (Oct. 22, 1991)

### BLOOD QUANTUM

Land may be acquired in trust status under the Indian Reorganization Act, 25 U.S.C. § 465 (1988), or the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 (1988), for members of the Five Civilized Tribes who possess less than 1/2 Indian blood.

Jack & Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 164 (Jan. 25, 1991) 98 I.D. 5

## CONTRACTS

### Generally

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

INDIANS--Continued

CONTRACTS--Continued

Generally--Continued

The Uniform Commercial Code and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

Based upon the general law of contracts, Indian contracts contain an implied requirement that they be carried out in good faith and in accordance with standards of commercial reasonableness: .

Winlock Veneer Co. v. Acting Juneau Area Director,  
Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

Under the terms of the timber contract at issue, the conditions of sale could only be modified in writing and with the approval of the BIA Agency Superintendent.

John P. Taylor, dba Taylor Logging v. Portland Area  
Director, Bureau of Indian Affairs, 20 IBIA 101  
(July 5, 1991)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

In general, the measure of damages for the breach of a contract relating to Indian trust or restricted lands is that amount of money which will place the owner in as good a position as he would have been in had the contract been fully performed.

Under the doctrine of avoidable consequences, damages for breach of contract are normally not awarded

## INDIANS--Continued

### CONTRACTS--Continued

#### Generally--Continued

to the nonbreaching party for those expenses which could have been avoided through the exercise of reasonable care. The doctrine does not, however, create enforceable rights in the breaching party.

Absent a specific provision in a contract entered into after a prior contract was breached, the BIA has no duty to obtain the consent of the party that breached the original contract before approving modifications to the resale contract.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs,  
21 IBIA 116 (Dec. 19, 1991)

#### Formation and Validity

##### Generally

The principle that tribal bingo management agreements are invalid absent approval under 25 U.S.C. § 81 (1988), applies to tribal agreements for bingo enterprises on tribal land within the St. Regis Mohawk Reservation.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

## INDIANS--Continued

### EDUCATION AND TRAINING

#### Tribally Controlled Schools

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Choctaw Nation of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 243 (Feb. 26, 1991)

### FINANCIAL MATTERS

#### Financial Assistance

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Bureau of Indian Affairs technical assistance provides applicants for Core Management grants with an opportunity to receive an advance indication of potential problems with their applications and with guidance in correcting those problems but does not guarantee that applicants who receive assistance will be funded.

In reviewing applications for Core Management grants, the Bureau of Indian Affairs should strive to minimize the effect of the personal judgments of individual reviewers.

Washoe Tribe of Nevada & California v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 190 (Feb. 5, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure proper consideration was given to all legal prerequisites to the exercise of discretion.

When a BIA Area Director denies an application for a loan guaranty on the grounds that he or she lacks confidence in the ability of a new business to repay the loan out of its profits, the administrative record should show how the Area Director reached this conclusion.

Fred A. Reed v. Minneapolis Area Director, Bureau of Indian Affairs, 19 IBIA 249 (Mar. 5, 1991)

Decisions concerning whether a request for a U.S. Direct Loan should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the BIA issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

David Pourier v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 266 (Mar. 21, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Under 25 CFR 286.17(a), if review of an application for a grant under the Indian Business Development Program by the Bureau of Indian Affairs suggests that the applicant may be able to obtain financing through other sources, the Bureau is required to ask the applicant to submit letters from two customary lenders in the area that are making loans for similar purposes, before it disapproves the grant application on the grounds that such financing should be available.

Under 25 CFR 286.17(g)(5), an application for a second grant for an Indian enterprise that has previously received a grant under the Indian Business Development Program must show that the additional grant will increase the enterprise's net profits, increase Indian employment, or both.

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 312 (Apr. 18, 1991)

A Bureau of Indian Affairs decision concerning the eligibility of a tribe for a Core Management grant under 25 CFR 278.22(a)(1) is a decision based on a legal conclusion and is subject to review by the Board of Indian Appeals.

For purposes of eligibility for a Core Management grant under 25 CFR 278.22(a)(1), a tribe's population includes members of the tribe who reside on or near the tribe's reservation, and may include as well non-member Indians who receive services from the tribe or who are socially or culturally affiliated with the tribe, but does not include non-member Indians who have no affiliation with the tribe.

Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 20 IBIA 39 (May 21, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

In order to be eligible for general assistance under 25 CFR Part 20, an applicant must reside within an Indian reservation or within the "near-reservation" area designated for the applicant's tribe.

After issuing a decision concerning general assistance benefits, a Bureau of Indian Affairs official may reverse that decision within the time for filing an appeal, provided no appeal has been filed.

Linda Stark, Edward Stark, & Frederick Stark v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 121 (July 11, 1991)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure proper consideration was given to all legal prerequisites to the exercise of discretion.

Benefits under the Indian Financing Act are available to economic enterprises which are at least 51 percent owned by members of Federally recognized Indian tribes.

Helen Polzer et al. v. Minneapolis Area Director, Bureau of Indian Affairs, 20 IBIA 158 (Aug. 5, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Decisions concerning whether an application for a loan under the Indian Revolving Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 176 (Aug. 13, 1991)

To be eligible for a grant under the Indian Business Development Program, an Indian-owned economic enterprise must be located on or near an Indian reservation.

Robert J. Harrison v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 20 IBIA 183 (Aug. 13, 1991)

A BIA decision denying a loan application under Title I of the Indian Financing Act, 25 U.S.C. §§ 1461-1469 (1988), will be summarily affirmed when it adequately explains the reason for denial and is supported by the administrative record, and when the appellant

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

fails to show that the Bureau's discretion was not properly exercised.

Power Fuel Producers, Inc. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 20 IBIA 190 (Aug. 16, 1991)

Under 25 CFR Part 20, general assistance provided by the BIA is intended to be a secondary or residual source of financial assistance and may not duplicate assistance received from other sources.

BIA Manual provisions concerning general assistance are without the force of law when sought to be applied against parties outside the Bureau. However, those provisions may be enforced against the Bureau where not to do so might result in a deprivation of benefits to an applicant for general assistance.

Lloyd Carter v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 195 (Aug. 20, 1991)

Under 25 U.S.C. § 1453 (1988), loans from the Indian Revolving Loan Fund may be made only to applicants who in the opinion of the Secretary are unable to obtain financing from other sources on reasonable terms and conditions.

When a challenge is raised to a discretionary decision issued by a BIA official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Raymond E. Patchen v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 219 (Aug. 27, 1991)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Core Management grants are made available to small tribes to assist them in establishing and maintaining sound management practices and fiscal control systems.

Sauk-Suiattle Indian Tribe v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 238 (Sept. 6, 1991)

The BIA must determine whether an applicant for an Indian Business Development Program grant is eligible for a grant prior to approving or disapproving the application.

Vanassa Douchette, dba Douchette Landscaping, Masonry & Paving v. Eastern Area Director, Bureau of Indian Affairs, 21 IBIA 7 (Oct. 8, 1991)

Decisions concerning whether an application for a loan under the Indian Revolving Loan Program should be approved are committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for

## INDIANS--Continued

### FINANCIAL MATTERS--Continued

#### Financial Assistance--Continued

that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Russell R. Kirn v. Billings Area Director, Bureau of Indian Affairs, 21 IBIA 53 (Nov. 13, 1991)

#### Individual Indian Money Accounts

Due process requires that the owner of an Individual Indian Money account be afforded a prompt hearing when a hold is placed on funds in the account.

The Secretary of the Interior is authorized to waive use of funds in Individual Indian Money accounts to satisfy indebtedness of Indians to the United States resulting from errors in recording Indian probate distributions.

Ardis Robinson v. Acting Billings Area Director, Bureau of Indian Affairs, 20 IBIA 168 (Aug. 13, 1991)

## HOUSING

#### Housing Improvement Program

The Board of Indian Appeals will refer to the Assistant Secretary--Indian Affairs an appeal requiring a decision as to whether to waive regulations set forth in 25 CFR 256.5(b), limiting certain categories of assistance under the Housing Improvement Program.

Jimmie L. Sanders v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 213 (Feb. 12, 1991)

INDIANS--Continued

HOUSING--Continued

Housing Improvement Program--Continued

Under the BIA's 1979 Housing Improvement Program regulations, title to a house constructed on tribal land did not vest in the grant recipient during the first 5 years following construction.

Christine A. Nix v. Acting Sacramento Area Director, BIA, 21 IBIA 42 (Nov. 7, 1991)

INDIAN REORGANIZATION ACT

Neither the IRA, 25 U.S.C. §§ 461-479 (1988), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

Review of tribal ordinances, even though required by a tribal constitution, is an intrusion into tribal self-government. Review should, therefore, be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24 (Oct. 22, 1991)

## INDIANS--Continued

### INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

#### Generally

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contract under the Act.

The BIA must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight responsibilities under the Indian Self-Determination Act.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

## LANDS

#### Generally

Public Law 100-638, 102 Stat. 3327, imposes a trust responsibility on the BIA in its administration of lands transferred to the Quinault Indian Nation by that Act.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

#### Aboriginal Title

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a trust

INDIANS--Continued

LANDS--Continued

Aboriginal Title--Continued

patent issued by BLM or to determine aboriginal title to land.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Allotments

Generally

In considering matters raised by one Indian against a second Indian relating to the second Indian's trust allotment, the Bureau of Indian Affairs' trust duty is to the person for whom the land is held in trust.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Allotments on Public Domain

Generally

The Board of Indian Appeals lacks jurisdiction over appeals from decisions of officials of the General Land Office or the Bureau of Land Management concerning Indian allotments on the public domain.

An untimely appeal from the rejection of an Indian allotment application must be dismissed.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

## INDIANS--Continued

### LANDS--Continued

#### Individual Trust or Restricted Land

##### Generally

In evaluating an application for acquisition of land in restricted fee status under 25 CFR 117.8, which lacks evaluation criteria, the BIA reasonably employed as guidelines the criteria for acquisition of land in trust status listed in 25 CFR 151.10.

The approval of requests to acquire land in restricted fee status for Osage Indians is committed to the discretion of the BIA. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Nancy Tillman Keil v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 126 (Dec. 19, 1991)

##### Alienation

Decisions concerning the approval of a mortgage of Indian trust or restricted land under 25 U.S.C. § 483a (1988), are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Caroline D. & James D. Tyler v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 144 (Jan. 8, 1991)

INDIANS--Continued

LANDS--Continued

Rights-of-Way

Under 25 CFR 169.19, the renewal of a right-of-way across individually owned Indian land requires the consent of the owners of a majority of the interests in the land.

The owner of an interest in individually owned Indian land may withdraw his/her consent to a right-of-way at any time prior to the granting of the right-of-way easement by the Bureau of Indian Affairs.

Nellie Moccasin v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 184 (Feb. 5, 1991)

In determining whether to revoke a permit for a drainage ditch, at the request of the Indian owner of a tract crossed by the ditch, the Bureau of Indian Affairs must consider, not only its trust obligation toward that landowner, but also its trust obligation toward other Indian landowners served by the ditch.

Christine Murphy v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 228 (Feb. 20, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to

INDIANS--Continued

LANDS--Continued

Rights-of-Way--Continued

show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

Tribal Lands

The principle that tribal bingo management agreements are invalid absent approval under 25 U.S.C. § 81 (1988), applies to tribal agreements for bingo enterprises on tribal land within the St. Regis Mohawk Reservation.

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 69 (June 10, 1991)

Under the BIA's 1979 Housing Improvement Program regulations, title to a house constructed on tribal land did not vest in the grant recipient during the first 5 years following construction.

Christine A. Nix v. Acting Sacramento Area Director, BIA, 21 IBIA 42 (Nov. 7, 1991)

Trust Acquisitions

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for

INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Land may be acquired in trust status under the Indian Reorganization Act, 25 U.S.C. § 465 (1988), or the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 (1988), for members of the Five Civilized Tribes who possess less than 1/2 Indian blood.

Jack & Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 164 (Jan. 25, 1991) 98 I.D. 5

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Under 25 CFR 151.8 the written consent of the governing tribe of a reservation is required before land within the reservation may be taken in trust for another tribe.

Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296 (Apr. 17, 1991)

A change in regulations governing the acquisition of lands in trust status should not be applied retroactively to a matter pending before the Bureau of Indian Affairs when the person affected detrimentally relied

INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

upon the policy and procedures that were in place at the time the trust acquisition was approved.

Georgiana Kautz v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 305 (Apr. 18, 1991)

In evaluating an application for acquisition of land in restricted fee status under 25 CFR 117.8, which lacks evaluation criteria, the BIA reasonably employed as guidelines the criteria for acquisition of land in trust status listed in 25 CFR 151.10.

Nancy Tillman Keil v. Muskogee Area Director, Bureau of Indian Affairs, 21 IBIA 126 (Dec. 19, 1991)

Trust Patent

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a trust patent issued by BLM or to determine aboriginal title to land.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the

INDIANS--Continued

LANDS--Continued

Trust Patent--Continued

case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

LEASES AND PERMITS

Generally

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

Where an oil and gas lease of Indian land imposes a duty upon the lessee to avoid waste and protect trust property, the lease does not expire because of a shut-in required to avoid an oil spill.

When the administrative record fails to support a Bureau of Indian Affairs Area Director's decision that an oil and gas lease of Indian land has expired because of failure to produce oil and/or gas in paying quantities, the decision will be vacated and the case remanded

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

for development of an adequate record and issuance of a new decision.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

Under 25 U.S.C. §§ 177 and 415 (1988), any lease of Indian trust or restricted land that is not approved by the Secretary of the Interior or his authorized representative is void ab initio, has no force or effect, and grants no rights to either the attempted lessor or lessee.

Bulletproofing, Inc., & Richard Medlin (President) v. Acting Phoenix Area Director, Bureau of Indian Affairs, 20 IBIA 179 (Aug. 13, 1991)

The BIA is bound by the terms of leases it has approved, when the leases are in accord with governing regulations.

Where BIA has approved an oil and gas lease which provides that the lease may not be included in a communitization agreement without the Indian landowner's consent, an Area Director may not approve a communitization agreement which includes the lease unless the landowner consents.

Kenneth F. Abbott v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 268 (Sept. 24, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

Although the BIA must approve a lease of trust or restricted land for the lease to be effective, it is not the lessor under the lease, and is not a party to the lease.

The Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 45 (Nov. 12, 1991)

Where the lessors under a lease of Indian trust land have authorized a BIA Superintendent to take certain actions on their behalf, the Superintendent's authority to act remains subject to limitations imposed by the trust responsibility.

Ramona Button & Harlan Bohnee v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 57 (Nov. 13, 1991)

An agreement which is, in essence, a lease of Indian trust land, although not so termed, is invalid unless approved by the Secretary of the Interior. Lacking approval, it grants no rights to either party.

In assessing an oil and gas lessee for past disposal of salt water on an off-lease tract of Indian land, the BIA should determine the fair market value of the use by means of an appraisal.

Citation Oil & Gas, Ltd. v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 75 (Dec. 17, 1991)

## INDIANS--Continued

### LEASES AND PERMITS--Continued

#### Generally--Continued

A BIA determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

An oil and gas lease issued under the IMLA of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

#### Amendments

A change in the date on which annual rental payments are due under a lease of Indian trust land is a modification of the lease.

Ramona Button & Harlan Bohnee v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 57 (Nov. 13, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Arbitration

When a lease of trust or restricted land provides that arbitration "may" be used to resolve disputes arising between the parties, arbitration is not the exclusive remedy available to the parties. The BIA and the Board of Indian Appeals have authority to consider disputes arising under such a lease when the parties do not agree to the use of arbitration.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

There is a general Federal policy favoring the use of arbitration. There is no statute suggesting that Congress intended to exempt the commercial dealings of Indians from that policy. Therefore, in the absence of extenuating circumstances, a provision in a lease of trust or restricted land requiring the use of arbitration for resolving disputes arising under the lease will be enforced.

The Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, 21 IBIA 45 (Nov. 12, 1991)

Assignments

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation

Unless there is a determination that a breach cannot be cured within a reasonable period of time or the lessee has already been given an opportunity to cure a breach and has failed to do so, leases subject to 25 CFR Part 162 cannot be cancelled without providing the lessee a reasonable opportunity to cure a breach.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

In determining whether to revoke a permit for a drainage ditch, at the request of the Indian owner of a tract crossed by the ditch, the Bureau of Indian Affairs must consider, not only its trust obligation toward that landowner, but also its trust obligation toward other Indian landowners served by the ditch.

Christine Murphy v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 228 (Feb. 20, 1991)

Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 50 (May 29, 1991)

A lease of trust or restricted Indian property is subject to cancellation when the lessee admits that a breach of the lease was not cured after the lessee was informed of the breach and was given an opportunity to cure it.

U.S. Fish Corp. v. Eastern Area Director, Bureau of Indian Affairs, 20 IBIA 93 (June 25, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

Where a lessee of Indian trust land has been given ample opportunity to cure a breach of the lease and has failed to do so, 25 CFR 162.14 does not require that he be given yet another opportunity.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Where the Bureau of Indian Affairs conducts a hearing under 25 CFR 211.27, it is responsible for preserving the evidence presented at the hearing.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

A BIA determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

Commercial Leases

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 33 (Oct. 24, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Farming and Grazing

Under 25 CFR 166.10, the Bureau of Indian Affairs is authorized to implement an approved tribal program for allocation of grazing privileges when the land involved is individually, rather than tribally, owned.

Howard J. Conway v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 29 (May 9, 1991)

Under 25 CFR 166.6, stocking rates on Indian range units are to be monitored and adjusted as conditions warrant. Accordingly, an appeal from a stocking rate is not necessarily untimely merely because it was not filed when the grazing permit was issued.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Gilbert Keester v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 20 IBIA 277 (Sept. 24, 1991)

Where a lease of Indian land provides for damages for noncompliance, damages may be assessed for a negligent act of noncompliance as well as an intentional one.

Gary H. Carlsen v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 281 (Sept. 30, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Subleases

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

Violation/Breach

Generally

Unless there is a determination that a breach cannot be cured within a reasonable period of time or the lessee has already been given an opportunity to cure a breach and has failed to do so, leases subject to 25 CFR Part 162 cannot be cancelled without providing the lessee a reasonable opportunity to cure a breach.

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 134 (Jan. 8, 1991)

The fact that a lessee abides by the terms of a lease of Indian trust or restricted land for a period of time does not excuse a later breach of those lease terms, or give the lessee some form of "right" to remain in possession of the leasehold.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

INDIANS--Continued

LEASES AND PERMITS--Continued

Violation/Breach--Continued

Damages

Where a lease of Indian land provides for damages for noncompliance, damages may be assessed for a negligent act of noncompliance as well as an intentional one.

Gary H. Carlsen v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 281 (Sept. 30, 1991)

MINERAL RESOURCES

Oil and Gas

Generally

Under Bureau of Indian Affairs Lease Form 5-157 (1957), paragraphs 10 and 1, the term "natural gas" unambiguously includes coalbed methane.

Before approving drilling permits for wells on the lease, the Department, pursuant to the Federal Government's trust responsibility to protect tribal resources, needs to satisfy itself that the proposed activities will be carried out with due regard for possible future coal mining operations.

Rights to Coalbed Methane Under an Oil & Gas Lease For Lands in the Jicarilla Apache Reservation, M-36970 (Oct. 16, 1990) 98 I.D. 59

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

Where an oil and gas lease of Indian land imposes a duty upon the lessee to avoid waste and protect trust property, the lease does not expire because of a shut-in required to avoid an oil spill.

When the administrative record fails to support a Bureau of Indian Affairs Area Director's decision that an oil and gas lease of Indian land has expired because of failure to produce oil and/or gas in paying quantities, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

Duncan Oil, Inc. v. Acting Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 131 (July 12, 1991)

In assessing an oil and gas lessee for past disposal of salt water on an off-lease tract of Indian land, the BIA should determine the fair market value of the use by means of an appraisal.

Citation Oil & Gas, Ltd. v. Acting Billings Area Director, Bureau of Indian Affairs, 21 IBIA 75 (Dec. 17, 1991)

A BIA determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

An oil and gas lease issued under the IMLA of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when,

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

Communitization Agreements

Where BIA has approved an oil and gas lease which provides that the lease may not be included in a communitization agreement without the Indian landowner's consent, an Area Director may not approve a communitization agreement which includes the lease unless the landowner consents.

Kenneth F. Abbott v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 268 (Sept. 24, 1991)

## INDIANS--Continued

### RESERVATIONS

#### Generally

Where the general intent to lease all gases is clear, the absence of specific intent to include coalbed methane as a gas in Bureau of Indian Affairs Lease Form 5-157 (1947), cannot create a reservation of that gas.

Rights to Coalbed Methane Under an Oil & Gas Lease For Lands in the Jicarilla Apache Reservation, M-36970  
(Oct. 16, 1990) 98 I.D. 59

### TIMBER RESOURCES

#### Generally

Decisions made by officials of the BIA as supervisors of Indian timber leases will be upheld when they are reasonable and based upon substantial evidence in the record.

Bernell Kombol, dba Grass Mountain Logging Co. v. Ass't Portland Area Director, Bureau of Indian Affairs,  
21 IBIA 116 (Dec. 19, 1991)

#### Timber\_Sales\_Contracts

##### Generally

The Uniform Commercial Code and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

Winlock Veneer Co. v. Acting Juneau Area Director,  
Bureau of Indian Affairs, 20 IBIA 3 (May 2, 1991)

INDIANS--Continued

TIMBER RESOURCES--Continued

Timber\_Sales\_Contracts--Continued

Generally--Continued

Under the terms of the timber contract at issue, the conditions of sale could only be modified in writing and with the approval of the BIA Agency Superintendent.

John P. Taylor, dba Taylor Logging v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 101 (July 5, 1991)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Keith Dahl v. Ass't Portland Area Director, Bureau of Indian Affairs, 20 IBIA 225 (Aug. 28, 1991)

Under the BIA's general forest regulations, "stumpage rate" means the stumpage value of timber, i.e., the value of uncut timber as it stands in the woods. 25 CFR 163.1.

D. G. & D. Logging Co. v. Billings Area Director, Bureau of Indian Affairs, 20 IBIA 229 (Aug. 29, 1991)

## INDIANS--Continued

### TRIBAL GOVERNMENT

#### Generally

The Department of the Interior is bound by its own properly promulgated regulations which have the force and effect of law.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

In furthering the doctrines of tribal sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes to resolve their own internal disputes.

Edgar A. Bowen v. Acting Portland Area Director, Bureau of Indian Affairs, 20 IBIA 263 (Sept. 23, 1991)

#### Constitutions, Bylaws, and Ordinances

A challenge to an election conducted under 25 CFR Part 81 must be filed within 3 days following posting of the election results. 25 CFR 81.22.

25 CFR 81.23(a) provides for posting of election results in the local BIA office.

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

## INDIANS--Continued

### TRIBAL GOVERNMENT--Continued

#### Constitutions, Bylaws, and Ordinances--Continued

Neither the IRA, 25 U.S.C. §§ 461-479 (1988), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

Review of tribal ordinances, even though required by a tribal constitution, is an intrusion into tribal self-government. Review should, therefore, be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs,  
21 IBIA 24 (Oct. 22, 1991)

#### Elections

A challenge to an election conducted under 25 CFR Part 81 must be filed within 3 days following posting of the election results. 25 CFR 81.22.

25 CFR 81.23(a) provides for posting of election results in the local BIA office.

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

#### Judicial System

The BIA must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Judicial\_System--Continued

responsibilities under the Indian Self-Determination Act.

Larry Martin v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 279 (Apr. 4, 1991) 98 I.D. 200

TRUST RESPONSIBILITY

In considering matters raised by one Indian against a second Indian relating to the second Indian's trust allotment, the Bureau of Indian Affairs' trust duty is to the person for whom the land is held in trust.

Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, 20 IBIA 108 (July 9, 1991)

Public Law 100-638, 102 Stat. 3327, imposes a trust responsibility on the BIA in its administration of lands transferred to the Quinault Indian Nation by that Act.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

Where the lessors under a lease of Indian trust land have authorized a BIA Superintendent to take certain actions on their behalf, the Superintendent's authority to act remains subject to limitations imposed by the trust responsibility.

Ramona Button & Harlan Bohnie v. Acting Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 57 (Nov. 13, 1991)

#### JUDICIAL REVIEW

(See also Administrative Procedure)

A statute establishing time limitations for commencement of civil actions for damages by the United States does not apply to limit administrative review within the Department of the Interior.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76  
(Apr. 5, 1991) 98 I.D. 207

#### LACHES

That BLM did not take action on a request for relinquishment of a coal lease until 2 years after it was filed, during which time late payment charges accrued, does not relieve the lessee of the obligation to pay late payment charges.

Ametex Corp., 121 IBLA 291 (Nov. 25, 1991)

#### MIGRATORY BIRD CONSERVATION ACT

(See also Wildlife Refuges & Projects)

##### GENERALLY

The sale of timber by BLM does not involve a "taking" of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988). This Act was not intended to include habitat modification or degradation among its prohibitions.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

#### MILLSITES

(See also Mining Claims)

#### GENERALLY

A decision finding a dependent placer millsite valid will be affirmed on appeal when the evidence demonstrates that the millsite was needed by the proprietor of a placer claim for fuel storage, equipment repair, and a sawmill and millsite, and was used or occupied by the proprietor of the claim for mining, milling, processing, beneficiation, or other operations in connection with the placer claim.

United States v. Donald L. & Dorothy E. Clark, 121 IBLA 260 (Nov. 15, 1991)

#### DETERMINATION OF VALIDITY

A decision finding a dependent placer millsite valid will be affirmed on appeal when the evidence demonstrates that the millsite was needed by the proprietor of a placer claim for fuel storage, equipment repair, and a sawmill and millsite, and was used or occupied by the proprietor of the claim for mining, milling, processing, beneficiation, or other operations in connection with the placer claim.

United States v. Donald L. & Dorothy E. Clark, 121 IBLA 260 (Nov. 15, 1991)

## MINERAL LANDS

(See also Mining Claims)

### GENERALLY

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

## MINERAL LANDS--Continued

### DETERMINATION OF CHARACTER OF

"Innocent purchaser for value." The phrase "innocent purchaser for value" appearing in the Transportation Act of 1940 does not refer to a subjective state of mind, but indicates instead the absence of knowledge of mineral character of land sold by a land grant railroad.

Lands may be mineral in character even though there has been no discovery of a valuable mineral on the land itself: external conditions may give mineral character to a tract. In railroad grant lands cases, mineral character is to be determined as of the time when the land was covered by the railroad.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre

MINERAL LANDS--Continued

DETERMINATION OF CHARACTER OF--Continued

tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

MINERAL RESERVATION

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

#### MINERAL LEASING ACT

(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits)

#### GYPSUM LEASES AND PERMITS

##### Workability

In making a determination that lands were subject to leasing rather than prospecting under permit, BLM properly relied upon the opinions of its expert staff using available data to find the lands contained a workable deposit of gypsum.

United States Gypsum Co., 121 IBLA 174 (Oct. 31, 1991)

#### RENTALS

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

## MINERAL LEASING ACT--Continued

### ROYALTIES

The discretionary authority conferred by 30 U.S.C. § 209 (1988), enables BLM to exercise prudent business judgment in considering whether to grant or deny an application for royalty reduction. Where BLM grants such a reduction "for the purpose of encouraging the greatest ultimate recovery of \* \* \* oil, \* \* \* and in the interest of conservation of natural resources," and where in its judgment "it is necessary to do so in order to promote development," BLM's determination will not be disturbed on appeal where it is amply supported by the facts of record and appellant has failed to show that the determination was either arbitrary, capricious, or an abuse of discretion.

State of Wyoming, 117 IBLA 316 (Jan. 24, 1991)

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied on coal recovered by underground mining operations from a Federal coal lease, and where BLM's subsequent decision and the accompanying case record fail to disclose a rational basis for its conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside.

BLM should provide the lessee the opportunity to submit data concerning whether conditions warrant a royalty rate of less than 8 percent for coal recovered by underground mining operations on a Federal coal lease, prior to making such determination.

Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (Mar. 14, 1991)

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

Under 30 U.S.C. § 209 (1988), BLM is authorized to reduce the royalty rate and waiver rentals for a coal lease for the purpose of encouraging the greatest ultimate recovery of Federal coal and in the interest of conservation of natural resources, if it determines either that such relief is necessary to promote development, or the Federal lease cannot be operated successfully under its existing terms. A BLM decision denying a royalty rate reduction and waiver of rentals may be set aside and remanded where that decision is based on BLM guidelines that do not address the unique circumstances of a not-for-profit, captive mine, which sells its entire production at cost to one of its owners, a not-for-profit electric generation and transmission cooperative, and which is an integral part of a rural electric power project financed by loans guaranteed by the Rural Electrification Administration, and on appeal, the Board of Land Appeals determines that such circumstances are appropriate for consideration.

Western Fuels-Utah, Inc., 119 IBLA 231 (May 14, 1991)

A coal lessee seeking reduction of the royalty rate on production from 12-1/2 percent to 8 percent must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms. Rejection of such an application may be affirmed where the record supports a finding that a royalty reduction is not necessary to encourage the greatest ultimate recovery of the Federally leased coal in that the bypass of any such coal in favor of privately leased coal would be merely temporary.

Western Energy Co., 119 IBLA 359 (June 21, 1991)

## MINERAL LEASING ACT--Continued

### ROYALTIES--Continued

A decision on lease readjustment pursuant to 30 U.S.C. § 207(a) (1988), and the implementing regulation at 43 CFR 3473.3-2(a)(3) (1987), setting the royalty rate for coal mined by underground operations at 8 percent and declining to reduce it to 5 percent on the basis of lack of evidence of adverse geologic or engineering conditions which would justify a lower rate over the entire term of the lease will be affirmed where supported by the record. A distinction between long-term geologic and engineering conditions likely to continue for the term of the lease, on the one hand, and shorter-term economic conditions which may be addressed in the context of a petition for reduction in royalty under 30 U.S.C. § 209 (1988), on the other hand, will be upheld as a reasonable interpretation of the statute and regulations governing readjustment of the royalty rates for coal leases.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGSMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

## MINERALS MANAGEMENT SERVICE

### GENERALLY

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

#### MINING CLAIMS

(See also Hearings, Millsites, Mineral Lands, Multiple Mineral Development Act, Surface Resources Act)

#### GENERALLY

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must comply with 43 CFR Subpart 3852. Failure to conform to requirements established by 43 CFR 3852.2, that a petition for deferment be filed with the state official where mining claim locations are required to be filed, state the requested term of deferment, be accompanied by a \$25 filing fee, and describe in detail the reasons why the deferment is sought, subjects a petition to denial.

Sunrise Mining & Exploration Co., 117 IBLA 377 (Feb. 12, 1991)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in U.S. v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct. The existence of a crucial misstatement of material fact upon which another party relied to its asserted detriment is a prerequisite to the invocation of estoppel.

United States v. Willie White et al., 118 IBLA 266 (Mar. 12, 1991) 98 I.D. 129

## MINING CLAIMS--Continued

### GENERALLY--Continued

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

When a mining claimant failed to show that the United States Forest Service denied him access to perform annual assessment work, his petition for deferment was properly denied. To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, he was required to show that a legal impediment prevented performance of the work by denying access to the claims. 30 U.S.C. § 28(b) (1988).

Michael Greninger, 119 IBLA 383 (July 3, 1991)

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the

## MINING CLAIMS--Continued

### GENERALLY--Continued

mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on

## MINING CLAIMS--Continued

### GENERALLY--Continued

the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

## MINING CLAIMS--Continued

### GENERALLY--Continued

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The un rebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing, there had been only one shipment of the mined product under an oral purchase

## MINING CLAIMS--Continued

### GENERALLY--Continued

and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

In accordance with 43 CFR 3852.2(a), a petition for deferment of assessment work must be signed by at least one of the owners of each claim involved. Where BLM records do not show the petitioners as the owners of the claims, BLM may not approve a petition for deferment of assessment work even though the petitioners claim to be the owners of the mining claims. Jurisdiction over disputes between rival mining claimants is reserved to the courts.

A petition for the deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1988), where "legal impediments" exist which affect the right of the mining claimant to enter upon the land or gain access to the boundaries thereof. Pending litigation to

## MINING CLAIMS--Continued

### GENERALLY--Continued

establish ownership of mining claims is not, in itself, such a legal impediment to access.

Beryl J. & Beatrice M. Strong, 121 IBLA 309 (Dec. 3, 1991)

### ABANDONMENT

Under 43 U.S.C. § 1744 (1988), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim. An unpatented mining claim is not exempt from the filing requirement when the estate of the owner is in probate.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

An affidavit of labor was timely received by BLM pursuant to 43 CFR 3833.0-5(m) when it was received before Jan. 19, after it had been sent to BLM in an envelope postmarked prior to Dec. 31 of the preceding year.

Joe H. Vozza, 121 IBLA 370 (Dec. 19, 1991)

### ASSESSMENT WORK

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must comply with 43 CFR Subpart 3852. Failure to conform to requirements established by 43 CFR 3852.2, that a petition for deferment be filed with the state official where mining claim locations are required

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

to be filed, state the requested term of deferment, be accompanied by a \$25 filing fee, and describe in detail the reasons why the deferment is sought, subjects a petition to denial.

Sunrise Mining & Exploration Co., 117 IBLA 377 (Feb. 12, 1991)

When a mining claimant failed to show that the United States Forest Service denied him access to perform annual assessment work, his petition for deferment was properly denied. To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, he was required to show that a legal impediment prevented performance of the work by denying access to the claims. 30 U.S.C. § 28(b) (1988).

Michael Greninger, 119 IBLA 383 (July 3, 1991)

BLM properly denies a petition for deferment of performance of annual assessment work where closure by the Forest Service of an area of a national forest due to a fire did not preclude access to the affected mining claims for the purpose of performing assessment work because the closure was not applicable to persons with permits and there was no evidence in the record that appellant sought a permit from the Forest Service and was denied one.

Horace S. Wilson, 120 IBLA 395 (Oct. 3, 1991)

## MINING CLAIMS--Continued

### ASSESSMENT WORK--Continued

In accordance with 43 CFR 3852.2(a), a petition for deferment of assessment work must be signed by at least one of the owners of each claim involved. Where BLM records do not show the petitioners as the owners of the claims, BLM may not approve a petition for deferment of assessment work even though the petitioners claim to be the owners of the mining claims. Jurisdiction over disputes between rival mining claimants is reserved to the courts.

A petition for the deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1988), where "legal impediments" exist which affect the right of the mining claimant to enter upon the land or gain access to the boundaries thereof. Pending litigation to establish ownership of mining claims is not, in itself, such a legal impediment to access.

Beryl J. & Beatrice M. Strong, 121 IBLA 309 (Dec. 3, 1991)

## COMMON VARIETIES OF MINERALS

### Generally

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Generally--Continued

not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented, the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Generally--Continued

question of "discovery," and there is a major distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Generally--Continued

normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Generally--Continued

showing the existence of potential buyers and the price they would pay.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Generally--Continued

the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

#### Special Value

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Special Value--Continued

varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Special Value--Continued

advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

#### Unique Property

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Unique Property--Continued

the deposit must hold a unique property which gives it a competitive edge over other pumice.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Unique\_Property--Continued

put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

#### CONTESTS

A valuable mineral sample does not equate to a valuable mineral deposit. An earlier report finding the existence of valuable minerals on a mining claim without analysis of the quality and quantity of the mineral deposit may be insufficient to overcome a prima facie case based on analysis of later detailed samples which

## MINING CLAIMS--Continued

### CONTESTS--Continued

lead a qualified mineral examiner to conclude at the hearing in a mining contest that there has been no discovery of a valuable mineral deposit.

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's explored workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such a case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit will not overcome a prima facie case that there is no mineral discovery.

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome

## MINING CLAIMS--Continued

### CONTESTS--Continued

the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant

## MINING CLAIMS--Continued

### CONTESTS--Continued

need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by showing the existence of potential buyers and the price they would pay.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a

## MINING CLAIMS--Continued

### CONTESTS--Continued

locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the

## MINING CLAIMS--Continued

### CONTESTS--Continued

case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success in developing a paying mine.

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

There is a clear distinction between "exploration" and "development" as these terms relate to discovery under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as attempting to locate a deposit and the subsequent mapping and drilling of the deposit to determine the extent and grade of the mineralization disclosed constitute exploration work.

Where evidence of record, considered in its entirety, fails to establish the existence of a valuable mineral deposit, as that term is understood in the mining laws, within the limits of any of the claims at issue, those claims are properly declared null and void.

United States v. Willie White et al., 118 IBLA 266  
(Mar. 12, 1991) 98 I.D. 129

The Secretary of the Interior has continuing jurisdiction with respect to public lands until patent issues, and he is not estopped by principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest; so long as legal title remains in the Government, the Secretary has the power and duty, upon proper notice and hearing, to

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

determine whether the claim is valid. The existence of older favorable mineral reports will not preclude a later contest of the validity of mining claims based on a subsequent mineral examination disclosing the absence of a valuable mineral deposit.

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability test which requires a showing that the mineral deposit can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

A valuable mineral sample does not equate to a valuable mineral deposit. An earlier report finding the existence of valuable minerals on a mining claim without analysis of the quality and quantity of the mineral deposit may be insufficient to overcome a prima facie case based on analysis of later detailed samples which lead a qualified mineral examiner to conclude at the hearing in a mining contest that there has been no discovery of a valuable mineral deposit.

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

As against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may have been perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. A discovery has been made if mineral has been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

To have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discovery cannot be based on speculation that at some time in the future an economic change or untested technological advance will render the mine valuable.

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of mineral material subject to location occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a higher price in the marketplace than similar common variety minerals.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by showing the existence of potential buyers and the price they would pay.

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

sale of other minerals (or products) may not be considered when predicting profitability.

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

tract within the claim must be shown to be mineral in character.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The un rebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing, there had been only one shipment of the mined product under an oral purchase and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

### DISCOVERY

#### Generally

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

There is a clear distinction between "exploration" and "development" as these terms relate to discovery under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

attempting to locate a deposit and the subsequent mapping and drilling of the deposit to determine the extent and grade of the mineralization disclosed constitute exploration work.

Where evidence of record, considered in its entirety, fails to establish the existence of a valuable mineral deposit, as that term is understood in the mining laws, within the limits of any of the claims at issue, those claims are properly declared null and void.

United States v. Willie White et al., 118 IBLA 266  
(Mar. 12, 1991) 98 I.D. 129

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

A valuable mineral sample does not equate to a valuable mineral deposit. An earlier report finding the existence of valuable minerals on a mining claim without analysis of the quality and quantity of the mineral deposit may be insufficient to overcome a prima facie case based on analysis of later detailed samples which lead a qualified mineral examiner to conclude at the hearing in a mining contest that there has been no discovery of a valuable mineral deposit.

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's explored workings. It is therefore incumbent upon a mining claimant to keep his discovery points

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such a case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit will not overcome a prima facie case that there is no mineral discovery.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

As against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may have been perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable minerals within the boundaries of the claim, no rights are acquired. A discovery has been made if mineral has been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

To have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discovery cannot be based on speculation that at some time in the future an economic change or untested technological advance will render the mine valuable.

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of mineral material subject to location occurs,

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have been vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a major distinction between the evidence and case law applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

can be accomplished by showing the existence of potential buyers and the price they would pay.

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, 30 U.S.C. § 36 (1988), also provides that an association of claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on that issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Generally--Continued

claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The un rebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing there had been only one shipment of the mined product under an oral purchase and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

#### Geologic Inference

Where an exposure exists which shows high and relatively consistent values, geologic inference may be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed area, such that the prudent man test of discovery might be met. However, geologic inference may not be used as a substitute for the actual exposure of the deposit within the limits of each claim at issue. Absent such exposure, there can be no discovery.

United States v. Willie White et al., 118 IBLA 266  
(Mar. 12, 1991) 98 I.D. 129

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Geologic\_Inference--Continued

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

#### Marketability

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means that a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

reasonable likelihood of success in developing a paying mine.

United States v. Willie White et al., 118 IBLA 266  
(Mar. 12, 1991) 98 I.D. 129

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability test which requires a showing that the mineral deposit can be extracted, removed, and marketed at a profit.

United States v. Ralph Page, 119 IBLA 12 (Mar. 18, 1991)

To have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discovery cannot be based on speculation that at some time in the future an economic change or untested technological advance will render the mine valuable.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service

## MINING CLAIMS--Continued

### DISCOVERY--Continued

#### Marketability--Continued

presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

The un rebutted evidence in a mining claim contest involving a claim subject to a patent application is that, as of the date of the hearing, there had been only one shipment of the mined product under an oral purchase and sales agreement. Being an oral contract, it was terminable at will, and a single shipment may have represented an isolated sale rather than the potential for continued sales of the mine product. Thus, the evidence was not sufficient to support a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

## MINING CLAIMS--Continued

### ENVIRONMENT

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

### EXCESS RESERVES

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

MINING CLAIMS--Continued

LANDS SUBJECT TO

Mining claims located on land which has been patented without a reservation of minerals to the United States are null and void ab initio.

Estate of Steve Pederson, 118 IBLA 210 (Mar. 7, 1991)

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

Mining claims located on land described by a townsite patent are properly declared null and void where the claimants, after being offered the opportunity to present evidence to show that their mining claims embrace lands within mining claims that were valid on the date of the townsite patent, fail to present proof that there was a valid discovery of a valuable mineral deposit on any such claims on the date of the townsite patent.

Norman R. Blake, Mildred L. Blake, 119 IBLA 141 (Apr. 25, 1991)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

A mining claim located on lands previously statutorily withdrawn by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1988), is null and void ab initio.

David R. Clark, 119 IBLA 367 (June 21, 1991)

Where the official records of BLM show that land upon which a mining claim has been located was patented by the United States without a mineral reservation, the mining claim is properly declared void ab initio.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

## MINING CLAIMS--Continued

### LOCATABILITY OF MINERAL

#### Generally

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the Common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of mineral material subject to location occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima

## MINING CLAIMS--Continued

### LOCATABILITY OF MINERAL--Continued

#### Generally--Continued

facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented, the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a major distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon

## MINING CLAIMS--Continued

### LOCATABILITY OF MINERAL--Continued

#### Generally--Continued

variety determination, but little bearing on market-ability.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a high price in the marketplace than similar common variety minerals.

When considering whether any of the mineral material on a mining claim may be considered an uncommon variety because it can be used for a particular use, a claimant need not demonstrate that the mineral material is an uncommon variety for that particular use. The mineral material on the claim is properly compared with other deposits of such mineral generally. Both direct and indirect evidence supporting a conclusion that other deposits of such mineral generally are unsuitable for that use can be used to establish that the mineral on the claim is an uncommon variety. Further, the claimant need only show that the mineral material is an uncommon variety by a preponderance of the evidence.

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being

## MINING CLAIMS--Continued

### LOCATABILITY OF MINERAL--Continued

#### Generally--Continued

put is a common variety use, the mineral material must carry some special economic value over and above the general run of pumice deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is of an uncommon variety. If the sales price for the mineral material sold for a particular use far exceeds the average sales price, the price differential advances the argument that the mineral material has some property giving it distinct and special value.

A claimant who bases his discovery on a deposit of mineral material listed in the Common Varieties Act, 30 U.S.C. § 611 (1988), must demonstrate by the preponderance of the evidence that the mineral material is of an uncommon variety. If a claimant demonstrates that the mineral material has some intrinsic quality rendering it suitable for a particular use, and that mineral material suitable for that use sells at a marked premium over mineral material used for common variety purposes, the claimant has met the burden of showing that the mineral material is of an uncommon variety. Unless and until evidence is presented establishing the fact that this use is also a common variety use, a claimant need not show that the product has some unique property rendering it suitable for the use commanding a premium.

If the mineral material supporting the discovery is a common variety mineral material listed in the Common Varieties Act, the claimant must demonstrate either that a discovery of the common variety mineral existed on July 23, 1955, or that the discovery mineral has some unique property giving the deposit a distinct and special economic value. To establish a pre-July 23, 1955, discovery, the claimant must demonstrate by a preponderance of the evidence that the mineral was marketable on July 23, 1955. This can be accomplished by

## MINING CLAIMS--Continued

### LOCATABILITY OF MINERAL--Continued

#### Generally--Continued

showing the existence of potential buyers and the price they would pay.

On appeal, the Forest Service contends that the Administrative Law Judge erred because the record does not support a finding that the claimant has met the marketability test. To prevail, the Forest Service must either tender evidence that the claimant cannot meet the marketability test, or demonstrate that the evidence submitted by the claimant supports a finding that there is no reasonable prospect that the commercial value of the deposit will exceed the cost of extracting, processing, transporting, and marketing the contained locatable mineral. When, as in this case, the Forest Service presents no evidence or testimony on one or more of these issues, the claimant is not required to do so. However, when a claimant having no duty to present evidence of production cost and sales price does present the evidence, the evidence presented by the claimant should be considered in making a discovery determination.

When there is more than one market for the product from a claim, and the sales in one or more of those markets would be considered as a sale of a common variety mineral, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

In an earlier mining claim contest, involving claims in close proximity to claims subsequently challenged, the Hearing Examiner found that the use of a similar common variety mineral found on those claims appeared to be a use over and above the normal uses of the general run of pumice deposits, held that the mineral was an uncommon variety, and dismissed the case. The prior decision is not binding on the Department in

## MINING CLAIMS--Continued

### LOCATABILITY OF MINERAL--Continued

#### Generally--Continued

the subsequent case, and the Department is not collaterally estopped from claiming that the mineral on the claims subsequently challenged is a common variety. Therefore, the Administrative Law Judge hearing the second contest is not compelled to find the mineral an uncommon variety because it is the same as the mineral considered in the first contest. The mere fact that a claimant possesses claims similar to claims deemed to be valid in an earlier contest is not dispositive of a mining claim contest.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

## LOCATION

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

## MINING CLAIMS--Continued

### LOCATION--Continued

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has the burden of proving that the claim was properly located on the ground in the position asserted.

A mining claim located at a time when the land is segregated from appropriation under the mining law by a small tract classification is properly declared null and void ab initio.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

## MINING CLAIMS--Continued

### LOCATION--Continued

Where the official records of BLM show that land upon which a mining claim has been located was patented by the United States without a mineral reservation, the mining claim is properly declared void ab initio.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

### LODE CLAIMS

To constitute a discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place bearing gold or some other mineral deposit in such quality and quantity as would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a paying mine. Absent such an exposure, there can be no valid lode claim.

United States v. Willie White et al., 118 IBLA 266  
(Mar. 12, 1991) 98 I.D. 129

### MILLSITES

A decision finding a dependent placer millsite valid will be affirmed on appeal when the evidence demonstrates that the millsite was needed by the proprietor of a placer claim for fuel storage, equipment repair, and a sawmill and millsite, and was used or occupied by the proprietor of the claim for mining, milling, processing, beneficiation, or other operations in connection with the placer claim.

United States v. Donald L. & Dorothy E. Clark, 121 IBLA 260 (Nov. 15, 1991)

## MINING CLAIMS--Continued

### MINERAL LANDS

The "mineral in character" and "discovery" tests are related, and "mineral in character" is determined using tests similar to the "prudent man" and the "marketability" tests applicable to discovery determinations. Both require mineralization which would cause a prudent person to expend further time and money on the property. There are differences, however. A mining claim must be supported by a discovery, and in order to prove a discovery, a claimant must show an actual exposure of the valuable mineral within the claim. On the other hand, facts that will support a mineral in character determination may not support a discovery, because a determination that the land is mineral in character can be based entirely upon geologic inference or other observable external conditions upon which a prudent and experienced person would rely. Thus, a tract of land may properly be deemed to be mineral in character, even though it contains no exposure of valuable mineral. If the known conditions are such as to engender the belief that the land contains a mineral deposit of such quality and quantity as would render its extraction profitable and justify expenditures to that end, the land is mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

### PATENT

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to

## MINING CLAIMS--Continued

### PATENT--Continued

the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has the burden of proving that the claim was properly located on the ground in the position asserted.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

### PLACER CLAIMS

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has the burden of proving that the claim was properly located on the ground in the position asserted.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

## MINING CLAIMS--Continued

### PLACER CLAIMS--Continued

Under 30 U.S.C. § 35 (1988), no placer claim shall include more than 20 acres for each individual claimant. However, claimants may locate a claim of up to 160 acres in size. In order to hold a 160-acre claim the association must have no fewer than eight members. A corporation is considered to be an individual claimant within the meaning of the law, and, as an individual claimant, a corporation cannot locate a mining claim containing more than 20 acres. If a validly located 160-acre association placer claim has been perfected and contains a valid discovery on the date of conveyance to a corporate entity, all 160 acres can be conveyed. If, on the other hand, there was no discovery on the claim on the date of conveyance, the claim was not valid on that date, and a subsequent discovery by the corporation would only validate a 20-acre claim.

A placer claim larger than 10 acres in size must have a discovery within its boundaries and each 10-acre tract within the claim must be shown to be mineral in character.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

### PLAN OF OPERATIONS

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

## MINING CLAIMS--Continued

### RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION

The Federal Land Policy and Management Act of 1976 requires the owner of a mining claim located on public land to file with the proper BLM office a copy of the official record of the notice or certificate of location within 90 days after the date of location. 43 U.S.C. § 1744(b) (1988). The "date of location" of a mining claim is the date determined under state law in the jurisdiction in which the mining claim is situated. 43 CFR 3833.0-5(h). Under Nevada law the date a mining claim is located is the date which is stated in the notice of location posted on the claim and repeated in the certificate of location filed with the county recorder. Upon a failure to timely file a copy of the notice of location with BLM, a claim is conclusively deemed abandoned and void.

Richard Bargaen, 117 IBLA 239 (Jan. 3, 1991)

Under 43 U.S.C. § 1744 (1988), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file a copy of the official record of the notice or certificate of location with BLM on or before Oct. 22, 1979, and failure to do so constituted an abandonment of the claim by the owner.

A BLM decision notifying the occupant of public land of the initiation of trespass proceedings and requiring the removal of unauthorized property, based on the fact that the holder of a life estate occupancy lease for the land in question had relinquished the lease, will be set aside where the record shows that the land was the subject of a mining claim properly recorded with BLM in 1982 and questions exist regarding present ownership of the claim and whether occupancy of the claim is reasonably incident to mining.

Mr. & Mrs. Michael Bosch, 119 IBLA 370 (June 26, 1991)

## MINING CLAIMS--Continued

### RELOCATION

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land that is common to the original location and the amendment.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

### SPECIFIC MINERAL(S) INVOLVED

#### Pumice

During the period preceding the date Congress enacted sec. 3 of the Act of July 23, 1955, pumice was locatable under the Mining Law of 1872. When Congress enacted the common Varieties Act, it removed previously locatable mineral from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if pumice is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of pumice. A showing that the deposit is of commercial value does not, in and of itself, make the pumice contained in the deposit an uncommon variety. The pumice

## MINING CLAIMS--Continued

### SPECIFIC MINERAL(S) INVOLVED--Continued

#### Pumice--Continued

contained in the deposit must hold a unique property which gives it a competitive edge over other pumice.

When Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1988), it specifically named common varieties of sand, stone, gravel, pumice, pumicite, and cinders as no longer subject to the Mining Law of 1872. If a common variety mineral meets an ASTM standard for a common variety use, that fact does no more than establish the ability to market and use it for that common variety use. Meeting the ASTM standard only establishes its value as a common variety mineral. To use ASTM standards as a basis for a determination that such mineral is an uncommon variety, it would be necessary to show that the qualities of the particular mineral so exceed ASTM standards that the particular mineral commands a higher price in the marketplace than similar common variety minerals.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

## SURFACE USES

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

## MINING CLAIMS--Continued

### SURFACE USES--Continued

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

A contestee overcomes the presumption that his answer to a contest complaint was not filed within 30 days from the date of receipt of the complaint by establishing that 14 days before the end of the 30-day period his answer was received by a DOI employee at the street address at which the answer was to be filed. It is proper to assume that the Department employee signing the return receipt card forwarded the answer to the addressee identified on the face of the answer, and it is reasonable to expect that it would take less than 14 days to deliver a letter to that addressee.

George M. Reedy et al., 120 IBLA 274 (Aug. 28, 1991)

### TUNNEL SITES

Pursuant to 30 U.S.C. § 27 (1988), failure to prosecute work on a tunnel for 6 months shall be considered an abandonment of the right to all undiscovered veins on the line of such tunnel.

The language of 30 U.S.C. § 27 (1988), clearly distinguishes between the right to undiscovered veins on the line of a tunnel and the right to use the tunnel for development of a mine. Failure to diligently prosecute

## MINING CLAIMS--Continued

### TUNNEL SITES--Continued

tunnel work for 6 months does not constitute a statutory abandonment of the right to use the tunnel site for development purposes.

The right to utilize a tunnel site for development of a mine is essentially a right-of-way and can be abandoned. Abandonment of a right-of-way can be predicated upon a showing that the means of enjoyment of it have long been in a state of disrepair.

United States v. Elmer H. Swanson, 119 IBLA 53 (Mar. 29, 1991) 98 I.D. 185

### WITHDRAWN LAND

A decision declaring mining claims null and void ab initio will be set aside where BLM's decision relies upon a Secretarial order withdrawing from location all islands in the Snake River and it is unclear from the record whether the lands claimed were ever part of an island included in the withdrawal.

C. A. Braun, 119 IBLA 252 (May 16, 1991)

An amended mining claim location is a location made in furtherance of an earlier valid location and relates back to the date of the original location as long as no adverse rights have intervened. The burden is on the claimant to establish that a mining claim location on land segregated from mineral entry, made after the segregation, is actually an amendment of a prior location made while the land was open to mineral location. To satisfy the burden, the claimant must show that the original location was properly made, that the amended location embraces lands included in original location, and that the claimant has an unbroken chain of title to the original locator. Such an amendment, however, preserves only that part of the original described land

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

that is common to the original location and the amendment.

A mining claimant who asserts that a notice of location misstates the beginning point of a claim has the burden of proving that the claim was properly located on the ground in the position asserted.

A mining claim located at a time when the land is segregated from appropriation under the mining law by a small tract classification is properly declared null and void ab initio.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

A mining claim located on lands previously statutorily withdrawn by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1988), is null and void ab initio.

David R. Clark, 119 IBLA 367 (June 21, 1991)

When a withdrawal or similar event affecting the ability to locate a claim or restricting the type of mineral material subject to location occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have vested in the claimant, and those rights cannot be cancelled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the

## MINING CLAIMS--Continued

### WITHDRAWN LAND--Continued

mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

## NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (See also Environmental Policy Act)

### GENERALLY

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

GENERALLY--Continued

42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

ENVIRONMENTAL STATEMENTS

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

The Department of the Interior has determined, as a general matter, that APD approval for exploratory drilling prior to the first confirmation well is an action categorically excluded from the NEPA process. The effect of a categorical exclusion is to eliminate the necessity for preparation of an EA. Individual actions within a categorical exclusion may, however, be excepted under certain circumstances, and require preparation of an environmental document.

An exploratory well is drilled in unproven or semiproven territory for the purpose of ascertaining the presence underground of a commercial petroleum deposit. Whether a well is exploratory and, accordingly, whether the Department's categorical exclusion for APD approval of an exploratory well applies, is committed to BLM's informed discretion.

An EA prepared by BLM to consider the impacts of the grant of an APD for an exploratory well will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made,

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

relevant areas of environmental concern have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to disclose any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

FINDING OF NO SIGNIFICANT IMPACT

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

there is no basis for its finding, and it will be set aside and remanded.

Nez Perce Tribal Executive Committee et al., 120 IBLA 34 (July 11, 1991)

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by 42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

On appeal from a finding of no significant impact after completion of an environmental analysis of the effects of a proposed action, the issue is whether the record supports a finding that the agency took a "hard look" at the environmental consequences of the proposed action, identified relevant areas of environmental concern, and established that the impacts studied are insignificant, or, with respect to any potentially

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

significant impacts, that mitigating measures incorporated in the proposal have reduced the potential impacts to insignificance.

The degree to which possible effects on the human environment are "highly uncertain or involve unique or unknown risks" is a relevant factor in determining the significance of the impact associated with a proposed action.

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

An EA prepared by BLM to consider the impacts of the grant of an APD for an exploratory well will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

NATIONAL HISTORIC PRESERVATION ACT

GENERALLY

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

## NATIONAL PARK SERVICE

### JURISDICTION OVER LANDS WITHIN

While the principal means by which a person becomes a "party to a case" within the meaning of 43 CFR 4.410(a) is to actively participate in the decision-making process which leads to the appeal, it is not the only means. Where BLM approves a Native allotment application on National Park System lands and the National Park Service files an appeal of that decision, the status of the National Park Service as the agency charged with administrative responsibilities for the management of such lands satisfies the "party to a case" requirement of 43 CFR 4.410(a).

National Park Service, 118 IBLA 204 (Mar. 6, 1991)

## OIL AND GAS LEASES

(See also Mineral Leasing Act, Outer Continental Shelf Lands Act)

### GENERALLY

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

A finding that a lessee must pay the United States for the full value of vented gas that was avoidably lost from 1980 to 1984 is reversed, because 43 CFR 3162.7-1(d), issued in Oct. 1984, changed Departmental policy to require that compensation for avoidably lost gas shall be limited to payment of the royalty value of gas so vented. Because the 1984 regulation changed the prior policy, which had been to assess vented gas at

## OIL AND GAS LEASES--Continued

### GENERALLY--Continued

full value, affected lessees who would benefit by the amended rule are allowed the benefit of the change.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76  
(Apr. 5, 1991) 98 I.D. 207

### ACQUIRED LANDS LEASES

A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close is properly subject to rejection. The future interest lease offeror may cure a defective description after the vesting of the mineral estate in the United States, so long as the curative action occurs prior to the filing of a present interest lease offer. Correcting the defective offer thereafter affords no priority in the face of the conflicting present interest lease offer.

The Moran Corp., 119 IBLA 178 (May 7, 1991)

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

APPLICATIONS

Generally

BLM may properly reject a noncompetitive oil and gas lease offer for lands which received a minimum bid at a competitive oil and gas lease sale, even though the bidder subsequently withdrew the bid.

Donald J. Eckelberg, 117 IBLA 390 (Feb. 13, 1991)

An oil and gas lease offer is properly rejected when the offer is deficient in the first year's rental by more than 10 percent. As the commingling, or transfer, of funds from one account to another without prior written permission is contrary to the orderly administration of the oil and gas leasing program, the offer must be rejected despite the fact that BLM held funds in other accounts to be returned to the offeror.

Stephen S. Lange, 119 IBLA 45 (Mar. 25, 1991)

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

Description

A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close is properly subject to rejection. The future interest lease offeror may cure a defective description after the vesting of the mineral estate in the United States, so long as the curative action occurs prior to the filing of a present interest lease offer. Correcting the defective offer thereafter affords no priority in the face of the conflicting present interest lease offer.

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1984, the offer may include several descriptions or means to identify the lands sought. If, after BLM has reviewed all available documents in the offer, it must still refer to extraneous materials to delimit the extent of the offer, the offer is insufficient and must be rejected.

The Moran Corp., 119 IBLA 178 (May 7, 1991)

## OIL AND GAS LEASES--Continued

### APPLICATIONS--Continued

#### Description--Continued

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

### ASSIGNMENTS OR TRANSFERS

A lease may not be assigned except with the consent of the Secretary of the Interior and an assignment does not become effective until after it has been filed in the proper BLM office and other requirements have been met. The requirement to file three original executed copies of an assignment was established by Congress and cannot be waived by the Department. A lease assignment not executed using a proper lease transfer form may not be approved.

An oil and gas lease assignment filed with BLM is properly denied where the assignee fails to file three original executed copies of the assignment on an approved form. However, where BLM is aware of a controversy concerning assignment of the lease, Department policy requires withholding action on any other assignment until the dispute is resolved through settlement or litigation. And if BLM has approved another assignment,

## OIL AND GAS LEASES--Continued

### ASSIGNMENTS OR TRANSFERS--Continued

it will be directed to take no further action concerning the land for a period of time in order to allow the parties to undertake settlement or initiate court action to otherwise resolve the dispute. Failure to take appropriate action within the time allowed will result in confirmation of the approved assignment.

Pat Reed, 119 IBLA 338 (June 18, 1991)

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

### BONA FIDE PURCHASER

A bona fide purchaser who is the assignee of a lease describing lands unavailable for lease is not entitled to the protection offered by 30 U.S.C. § 184(h)(2) (1988), and 43 CFR 3108.4.

Petrolex 84-1 Ltd., 118 IBLA 372 (Mar. 14, 1991)

### BONDS

Under the regulations governing bonds for oil and gas geophysical exploration, liability for a particular oil and gas geophysical exploration operation automatically terminates by operation of law on the 91st day following the filing of a notice of completion of oil and gas exploration operations if BLM fails to notify the party filing the notice within 90 days of the filing

## OIL AND GAS LEASES--Continued

### BONDS--Continued

that all terms and conditions have been met or that additional action is required to rehabilitate the lands. Where BLM fails to provide such notice and a number of years later seeks to collect on the nationwide oil and gas geophysical exploration bond for the costs of correcting improperly plugged shot holes, the regulation precludes such collection.

Insurance Co. of North America, 120 IBLA 384 (Sept. 25, 1991)

### CANCELLATION

An oil and gas lease which was improperly issued because title to the land embraced by the lease was vested in the State of Oklahoma is properly cancelled by the Bureau of Land Management pursuant to 43 CFR 3108.3(d) (1988), when the leasehold does not contain a well capable of production of oil or gas in paying quantities, and is not committed to an approved cooperative or unit plan or communitization agreement.

Suzanne Walsh, 117 IBLA 267 (Jan. 15, 1991)

### CIVIL ASSESSMENTS AND PENALTIES

Assessments for the nonreporting and late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of FOGPMA, 30 U.S.C. § 1719 (1988), and are not subject to the procedures required by that section.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Violation of the regulation requiring posting of signs on a well within a Federal or Indian lease (43 CFR 3162.6(a)) is a minor violation and BLM may properly assess an operator \$250 for failure to abate a minor violation within the time allowed. 43 CFR 3163.1(a)(2).

Diversified Operating Corp., 119 IBLA 107 (Apr. 15, 1991)

Drilling a gas well on a Federal or Indian oil and gas lease without obtaining the prior approval of BLM is a violation of 43 CFR 3162.3-1(c), and, under 43 CFR 3163.1(b)(2), BLM is required to impose an assessment of \$500 per day for each day that the violation exists, including the days the violation existed prior to discovery, not to exceed \$5,000.

A person who holds no interest in a Federal or Indian oil and gas lease, yet, through inadvertence, ignorance, or dishonesty, drills a well on such a lease, is liable for violations of the Federal oil and gas operating regulations and may be assessed for drilling the well without obtaining prior BLM approval.

Jack Corman, 119 IBLA 289 (June 6, 1991)

Under 43 CFR 3163.1(a)(2), BLM may properly assess an oil and gas operator \$500 for failure to comply timely with notices of incidents of noncompliance requiring the removal of oil from water disposal pits.

Joseph B. Gould, 120 IBLA 237 (Aug. 9, 1991)

## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

It is proper for BLM to levy an assessment pursuant to 43 CFR 3163.1(b)(1), for an oil and gas lessee's failure to have blowout prevention equipment installed at a well during plugging and abandoning operations, when the installation of that equipment is required by an approved plan.

Pioneer Oil & Gas, 121 IBLA 253 (Nov. 15, 1991)

An assessment levied pursuant to 43 CFR 3163.1(a)(2) is for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. Assessments under 43 CFR 3162.1(a)(2) are only applicable to those violations deemed "minor" by the authorized officer and the amount of damages is discretionary, limited to a maximum amount of \$250. As the Board normally accords considerable deference to such judgmental decisions when they are supported by substantial evidence, a decision to assess \$250 for each minor violation will be affirmed where the appellant has not presented sufficient evidence to establish by a preponderance that the decision is in error.

Fancher Oil Co., 121 IBLA 397 (Dec. 26, 1991)

### COMPENSATORY ROYALTY

Before the Board of Land Management may assess compensatory royalties against an oil and gas lessee for drainage by an adjacent well, it must demonstrate that the lessee knew, or that a reasonably prudent operator should have known, of the drainage. While a lessee who holds an interest in both the offending well and the drained Federal lease, is considered to have knowledge

OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

of drainage from the time he drills the offending well, under other circumstances the Department must show that a lessee knew or that a reasonably prudent operator would have known there was drainage.

Jerome P. McHugh & Associates (On Reconsideration),  
117 IBLA 303 (Jan. 17, 1991)

A Federal oil and gas lessee was properly assessed compensatory royalty for failure to drill an offset well within 5 months after collection of data indicating that an economic offsetting well should be drilled to protect the Federal lessor.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

A finding that there was drainage from an Indian oil and gas lease is affirmed on appeal where no error is shown to exist in parameters used by BLM to calculate drainage.

An assessment of compensatory royalty effective 6 months after completion of the offending well must be vacated where the record does not establish whether the lessee of the drained oil and gas lease had learned that drainage was occurring before notice of that fact was given by BLM, an event that did not occur until 9 years after the offending well was completed.

Meridian Oil Co., 120 IBLA 359 (Sept. 16, 1991)

## OIL AND GAS LEASES--Continued

### COMPETITIVE LEASES

Pursuant to the provisions of 43 CFR Part 3120, a personal check is an acceptable method of payment for a bid submitted at a competitive lease sale. However, a personal check that is not honored by the bank does not constitute payment, absent an acknowledgment of error by the bank. A letter from the bank to BLM stating that a check was not honored because it was an "outdated" check does not constitute an acknowledgment of bank error.

Twin Arrow, Inc., 118 IBLA 55 (Feb. 21, 1991)

The regulations governing competitive lease sales provide that the winning bidder must submit the minimum bonus bid, the first year's rental, and the administrative fee on the date of the sale. 43 CFR 3120.5-2(b). The balance of the bonus bid must be submitted within 10 working days after the competitive lease sale date (43 CFR 3120.5-2(c)), and failure to submit the balance within the prescribed period will result in bid rejection and forfeiture of monies previously tendered. 43 CFR 3120.5-3(a).

A party claiming reliance upon a misrepresentation by a Department employee must be ignorant of the true facts. When a party successfully bidding at an oil and gas lease sale receives a Receipt and Accounting Advice Statement indicating less than full payment of the monies owing, the bidder cannot claim ignorance of the fact that additional monies are due. BLM properly rejected the lease offer upon the bidder's failure to pay the balance of the bonus bid within 10 working days after the sale.

Partnership One, Inc., 119 IBLA 7 (Mar. 15, 1991)

## OIL AND GAS LEASES--Continued

### DESCRIPTION OF LAND

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

### DISCOVERY

An exploratory well is drilled in unproven or semiproven territory for the purpose of ascertaining the presence underground of a commercial petroleum deposit. Whether a well is exploratory and, accordingly, whether the Department's categorical exclusion for APD approval of an exploratory well applies, is committed to BLM's informed discretion.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

OIL AND GAS LEASES--Continued

DRAINAGE

Before the Board of Land Management may assess compensatory royalties against an oil and gas lessee for drainage by an adjacent well, it must demonstrate that the lessee knew, or that a reasonably prudent operator should have known, of the drainage. While a lessee who holds an interest in both the offending well and the drained Federal lease, is considered to have knowledge of drainage from the time he drills the offending well, under other circumstances the Department must show that a lessee knew or that a reasonably prudent operator would have known there was drainage.

Jerome P. McHugh & Associates (On Reconsideration),  
117 IBLA 303 (Jan. 17, 1991)

A Federal oil and gas lessee was properly assessed compensatory royalty for failure to drill an offset well within 5 months after collection of data indicating that an economic offsetting well should be drilled to protect the Federal lessor.

If a lessee contends that a prudent operator would not have drilled a protective well in 1982 because it would not have been profitable, to prevail, the lessee must also prove by a preponderance of evidence that a protective well drilled in 1982 would not then have been profitable.

Kerr-McGee Corp., 118 IBLA 119 (Mar. 6, 1991)

A finding that there was drainage from an Indian oil and gas lease is affirmed on appeal where no error is shown to exist in parameters used by BLM to calculate drainage.

An assessment of compensatory royalty effective 6 months after completion of the offending well must be vacated where the record does not establish whether the lessee of the drained oil and gas lease had learned that drainage was occurring before notice of that fact was

## OIL AND GAS LEASES--Continued

### DRAINAGE--Continued

given by BLM, an event that did not occur until 9 years after the offending well was completed.

Meridian Oil Co., 120 IBLA 359 (Sept. 16, 1991)

### DRILLING

Issuance of oil and gas leases does not confer such an unfettered right to development of the oil and gas resources as to preclude detailed consideration of a range of alternatives, including the limitation or regulation of the manner and pace of development, when preparing an environmental analysis or EIS regarding development of methane gas from coal deposits underlying a 2,160-square mile area. Approval of applications for permit to drill for exploration and/or development of the gas is subject to regulation to avoid adverse environmental impacts in the interest of conservation of natural resources.

The Board is unable to affirm a finding that no significant impact to the environment will result from a proposal for drilling coalbed methane gas wells in a 2,160-acre study area where the environmental analysis upon which the finding is based fails to give appropriate consideration to obvious alternatives, such as staggering development over time, as required by 42 U.S.C. § 4332(2)(E) (1988), 40 CFR 1508.9(b), and 516 DM 3.4(A).

Powder River Basin Resource Council, Montana Dept. of Health & Environmental Sciences, Montana Dept. of Natural Resources & Conservation, 120 IBLA 47 (July 12, 1991)

OIL AND GAS LEASES--Continued

DRILLING--Continued

The Department of the Interior has determined, as a general matter, that APD approval for exploratory drilling prior to the first confirmation well is an action categorically excluded from the NEPA process. The effect of a categorical exclusion is to eliminate the necessity for preparation of an EA. Individual actions within a categorical exclusion may, however, be excepted under certain circumstances, and require preparation of an environmental document.

An exploratory well is drilled in unproven or semiproven territory for the purpose of ascertaining the presence underground of a commercial petroleum deposit. Whether a well is exploratory and, accordingly, whether the Department's categorical exclusion for APD approval of an exploratory well applies, is committed to BLM's informed discretion.

An EA prepared by BLM to consider the impacts of the grant of an APD for an exploratory well will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Utah Chapter Sierra Club et al., 120 IBLA 229 (Aug. 8, 1991)

OIL AND GAS LEASES--Continued

DRILLING--Continued

43 CFR 3165.4(c) prevents the suspension on appeal of a notice of violation or assessment or an instruction, order, or decision or a notice of proposed penalty. In accordance with 43 CFR 4.21(a), a timely appeal to the Interior Board of Land Appeals suspends the effect of a decision approving an Application for Permit to Drill pending the decision on appeal.

Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, 121 IBLA 1 (Oct. 4, 1991) 98 I.D. 267

A determination that approval of an APD to drill exploratory wells will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

BLM is not required to provide for public review of an environmental assessment of APDs to drill exploratory wells before making a FONSI and deciding to approve the applications when the proposed action is not closely similar to one which normally requires the preparation of an EIS.

BLM does not violate sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), by approving APDs before receiving a belated response from the U.S. Fish and Wildlife Service to a request for consultation when

## OIL AND GAS LEASES--Continued

### DRILLING--Continued

it plans to require the lessee to take an action that obviates the need for formal consultation.

Southern Utah Wilderness Alliance, Utah Chapter of the Sierra Club, 122 IBLA 6 (Dec. 31, 1991)

### EXPIRATION

An oil and gas lease issued under the IMLA of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 21 IBIA 88 (Dec. 18, 1991) 98 I.D. 419

### FUTURE AND FRACTIONAL INTEREST LEASES

BLM properly rejects a future interest noncompetitive oil and gas lease offer where the land has been determined to be within the known geologic structure of a producing oil or gas field because there is a reasonable probability that a producing structure continues across that land, and where the offeror has not established the contrary by a preponderance of the evidence.

Enron Oil & Gas Co., 117 IBLA 392 (Feb. 13, 1991)

## OIL AND GAS LEASES--Continued

### FUTURE AND FRACTIONAL INTEREST LEASES--Continued

A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close is properly subject to rejection. The future interest lease offeror may cure a defective description after the vesting of the mineral estate in the United States, so long as the curative action occurs prior to the filing of a present interest lease offer. Correcting the defective offer thereafter affords no priority in the face of the conflicting present interest lease offer.

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1984, the offer may include several descriptions or means to identify the lands sought. If, after BLM has reviewed all available documents in the offer, it must still refer to extraneous materials to delimit the extent of the offer, the offer is insufficient and must be rejected.

The Moran Corp., 119 IBLA 178 (May 7, 1991)

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such tract includes within it another tract not sought for leasing, the area

OIL AND GAS LEASES--Continued

FUTURE AND FRACTIONAL INTEREST LEASES--Continued

excluded must likewise be described by course and distance between its angle points.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

INCIDENTS OF NONCOMPLIANCE

Violation of the regulation requiring posting of signs on a well within a Federal or Indian lease (43 CFR 3162.6(a)) is a minor violation and BLM may properly assess an operator \$250 for failure to abate a minor violation within the time allowed. 43 CFR 3163.1(a)(2).

Diversified Operating Corp., 119 IBLA 107 (Apr. 15, 1991)

Under 43 CFR 3163.1(a)(2), BLM may properly assess an oil and gas operator \$500 for failure to comply timely with notices of incidents of noncompliance requiring the removal of oil from water disposal pits.

Joseph B. Gould, 120 IBLA 237 (Aug. 9, 1991)

It is proper for BLM to levy an assessment pursuant to 43 CFR 3163.1(b)(1), for an oil and gas lessee's failure to have blowout prevention equipment installed at a well during plugging and abandoning operations, when the installation of that equipment is required by an approved plan.

Pioneer Oil & Gas, 121 IBLA 253 (Nov. 15, 1991)

## OIL AND GAS LEASES--Continued

### INCIDENTS OF NONCOMPLIANCE--Continued

An oil and gas operator that challenges a determination that it did not timely abate an incident of non-compliance with applicable regulations, lease terms, or written order bears the burden of establishing by a preponderance of the evidence that the determination was in error.

Fancher Oil Co., 121 IBLA 397 (Dec. 26, 1991)

### KNOWN GEOLOGIC STRUCTURE

BLM properly rejects a future interest noncompetitive oil and gas lease offer where the land has been determined to be within the known geologic structure of a producing oil or gas field because there is a reasonable probability that a producing structure continues across that land, and where the offeror has not established the contrary by a preponderance of the evidence.

Enron Oil & Gas Co., 117 IBLA 392 (Feb. 13, 1991)

### LANDS SUBJECT TO

Lands situated within the boundaries of incorporated cities and towns are expressly excluded from leasing by sec. 1 of the Mineral Leasing Act of 1920 and a decision rejecting an offer for such lands is properly affirmed.

Estate of D. A. Moore, 120 IBLA 271 (Aug. 22, 1991)

## OIL AND GAS LEASES--Continued

### NONCOMPETITIVE LEASES

BLM may properly reject a noncompetitive oil and gas lease offer for lands which received a minimum bid at a competitive oil and gas lease sale, even though the bidder subsequently withdrew the bid.

Donald J. Eckelberg, 117 IBLA 390 (Feb. 13, 1991)

### OFFERS TO LEASE

BLM properly rejects a future interest noncompetitive oil and gas lease offer where the land has been determined to be within the known geologic structure of a producing oil or gas field because there is a reasonable probability that a producing structure continues across that land, and where the offeror has not established the contrary by a preponderance of the evidence.

Enron Oil & Gas Co., 117 IBLA 392 (Feb. 13, 1991)

### PRODUCTION

Pursuant to provision of 43 CFR 3162.3-4, the Department must allow an oil and gas operator a reasonable time to produce or plug and abandon a well in which oil and gas is not encountered in paying quantities. It was not unreasonable to require an operator to plug and abandon a well after the operator was allowed from Aug. 1988 until Feb. 1990 to produce the well.

Viking Exploration, Inc., 119 IBLA 73 (Apr. 5, 1991)

## OIL AND GAS LEASES--Continued

### REINSTATEMENT

A petitioner for reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1988), is required to show that failure to timely pay rental was justifiable or not due to a lack of reasonable diligence. Where petitioners failed to show how a late payment was caused by reasons beyond their control, their petition was properly denied.

Denise M. White, Robert M. White, 120 IBLA 163 (July 18, 1991)

Where a noncompetitive oil and gas lessee fails to pay annual rental on or before the anniversary date of the lease and no oil or gas is being produced on the lease, the lease automatically terminates by operation of law. BLM may reinstate the lease pursuant to 43 CFR 3108.2-2(a) if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Where BLM approves an assignment of record title in an oil and gas lease to a party on May 12, well in advance of the June 1 anniversary date of the lease, lessee's assertion that she was unable to ascertain whether the assignment had been approved and where to mail the rental payment does not establish that the failure to pay rental timely was justified where she admits that she knew of the approval on or prior to the due date for the payment.

A late payment of rental may not be justified on the basis that the lessee did not receive a courtesy notice from MMS.

The provisions of 43 CFR 3108.2-2(a) recognize as reasonable diligence the mailing of rental payment to MMS on or before its due date and direct BLM to consider the postmark date in determining when the payment was mailed. This provision tacitly requires that a rental payment must be timely mailed to MMS in such a manner that it has a reasonable chance of being received there. Where a lessee mails the payment to MMS in an envelope bearing no street address, city, state, or zip

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

code, the payment had no chance of being received by MMS, and the lessee's actions do not constitute reasonable diligence in timely making the rental payment.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. In the absence of proof of other extraordinary circumstances causing disruption in a lessee's life, deaths in her family almost 8 months prior to the anniversary date of the lease, and a corresponding increase in the complexity of the lessee's business affairs, do not excuse her late payment.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the lease anniversary date does not constitute reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day on which the office is open) as required by the regulation at 43 CFR 3108.2-2(a).

Karl Mladinich, Victor Votaw, 120 IBLA 391 (Sept. 30, 1991)

## OIL AND GAS LEASES--Continued

### RENTALS

30 U.S.C. § 188(b) (1988), and 43 CFR 3108.2-1(b) require that a notice of deficiency be sent by the Secretary to an oil and gas lessee whose rental payment is paid on or before the anniversary date of the lease but in an amount nominally deficient. Where the regulation requires that this notice be served by certified mail, return receipt requested, it is not unreasonable to look to the party asserting delivery to produce positive proof of such event, e.g., by producing a signed return receipt card.

Petrolex 84-1 Ltd., 118 IBLA 372 (Mar. 14, 1991)

An oil and gas lease offer is properly rejected when the offer is deficient in the first year's rental by more than 10 percent. As the commingling, or transfer, of funds from one account to another without prior written permission is contrary to the orderly administration of the oil and gas leasing program, the offer must be rejected despite the fact that BLM held funds in other accounts to be returned to the offeror.

Stephen S. Lange, 119 IBLA 45 (Mar. 25, 1991)

### ROYALTIES

#### Generally

The discretionary authority conferred by 30 U.S.C. § 209 (1988), enables BLM to exercise prudent business judgment in considering whether to grant or deny an application for royalty reduction. Where BLM grants such a reduction "for the purpose of encouraging the greatest ultimate recovery of \* \* \* oil, \* \* \* and in the interest of conservation of natural resources," and where in its judgment "it is necessary to do so in order to promote development," BLM's determination will not be disturbed on appeal where it is amply supported by the facts of

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

record and appellant has failed to show that the determination was either arbitrary, capricious, or an abuse of discretion.

State of Wyoming, 117 IBLA 316 (Jan. 24, 1991)

The holder of oil and gas leases issued for lands on the Outer Continental Shelf by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act must pay royalties in accordance with the provisions of the original State leases. Where the leases were issued on the 1942 Louisiana State lease form, which provides that the lessee pay to the lessor "sums equal to the value \* \* \* at the well [of one-eighth of all gas produced and saved or utilized], provided no gathering or other charges are made chargeable to lessor," the lessee is not permitted to deduct transportation allowances from the amount on which royalty is calculated.

Exxon Co., U.S.A., 118 IBLA 30 (Feb. 21, 1991)

In valuing sour gas for royalty purposes, MMS erred in denying a transportation allowance for all reasonable costs incurred by a lessee in dehydrating the gas outside the gas field prior to its transportation to a processing plant where manufacture and further dehydration occur.

When evaluation of production is challenged, appellant must not merely show that the agency's methodology is susceptible to error, but that an error did, in fact, occur. The agency's limitation of a transportation allowance will not be disturbed in the absence of evidence demonstrating error.

Exxon Corp., 118 IBLA 221 (Mar. 8, 1991) 98 I.D. 110

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

Assessments for the nonreporting and late reporting of royalties pursuant to 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of FOGRMA, 30 U.S.C. § 1719 (1988), and are not subject to the procedures required by that section.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

The inclusion in a transportation allowance for royalty oil of a return on capital assets based on the prime rate of interest may be sustained as reasonable, but where the date on which the prime rate is determined is inconsistent with prior applications of the rate upheld as reasonable, the case will be remanded to resolve the inconsistency.

Exxon Co., U.S.A., 119 IBLA 48 (Mar. 28, 1991)

When the purchaser of natural gas produced from Federal leases reimburses the lessee for State taxes pursuant to a contract for purchase and sale of the natural gas, gross proceeds received from the leases include the tax reimbursements. Accordingly, in computing the value of the gas produced from these leases, MMS properly determines that the gross proceeds to which the royalty rate applies include the purchase price plus the tax reimbursements and properly demands additional royalty and late payment charges where royalty payments were made using a value that excluded the tax reimbursements.

Where a lessee enjoys a contractual right to receive reimbursement for "all existing taxes levied on the gas produced and sold" under the contract, and where, for no apparent justifiable reason, it fails to invoke this right, the lessee is properly held responsible for royalty as though the contractual provision had been invoked. Thus, in the absence of any showing

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

of justification, lessee was responsible for paying royalty on all reimbursements owed under the sales contract, regardless of whether lessee ever enforced its contractual rights by actually collecting the reimbursements.

BWAB, Inc., 121 IBLA 188 (Nov. 7, 1991)

The costs of "treatment" or other costs necessary to place the gas in marketable condition are not deductible or chargeable against the Federal royalty interest. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition. MMS' decision barring lessees from using an 88-percent price-reduction factor in the computation of royalty on natural gas will be affirmed where costs represented by the factor were incurred in the process of extraction of hydrogen sulfide (sweetening), which was necessary to place the natural gas in marketable condition.

Exxon Co., U.S.A., Chevron U.S.A., Inc., 121 IBLA 234  
(Nov. 15, 1991) 98 I.D. 409

An operator and lessee have an affirmative duty to obtain the best possible price for the benefit of the royalty owner, consistent with reasonable business judgment. Therefore, when the contract under which the natural gas is being sold provides for payment at the highest obtainable ceiling price under the NGPA, 15 U.S.C. §§ 3301-3432 (1988), the operator or lessee has an affirmative duty to seek classification under the NGPA section affording the best possible price. If the operator or lessee fails to exercise due diligence in obtaining a classification affording a higher sales

## OIL AND GAS LEASES--Continued

### ROYALTIES--Continued

#### Generally--Continued

price, the royalty may properly be calculated as if the higher sales price had been paid.

MMS properly requires the payment of additional royalties where reimbursements for State production taxes made by the purchaser of natural gas produced from an onshore oil and gas lease were improperly excluded from the value of that gas for royalty computation purposes.

In an audit of royalties on natural gas produced from an onshore oil and gas lease, MMS need not consider offsetting underpayments with overpayments if there is no substantive evidence that overpayments occurred or the extent of the overpayments. MMS may not disallow offset, however, when the basis for disallowing the offset is an unsupported assumption that an overpayment has already been recouped.

FMP Operating Co., 121 IBLA 328 (Dec. 13, 1991)

#### Interest

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

MMS is authorized to impose a late payment charge when it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of the production of wet gas.

Phillips Petroleum Co., Phillips 66 Natural Gas Co.,  
121 IBLA 278 (Nov. 19, 1991)

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

Natural Gas Liquid Products

MMS' Procedure Paper concerning valuation of NGLP for royalty purposes was not required to be promulgated as a regulation because it does not constitute a substantive rule of law, as it neither creates law nor changes established policy. Rather, it simply clarifies the methodology for applying the factors set forth in

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

30 CFR 206.150 (1985), providing internal guidance for how this authority should be exercised.

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

Payments

A finding that a lessee must pay the United States for the full value of vented gas that was avoidably lost from 1980 to 1984 is reversed, because 43 CFR 3162.7-1(d), issued in Oct. 1984, changed Departmental policy to require that compensation for avoidably lost gas shall be limited to payment of the royalty value of gas so vented. Because the 1984 regulation changed the prior policy, which had been to assess vented gas at full value, affected lessees who would benefit by the amended rule are allowed the benefit of the change.

Mobil Exploration & Producing U.S., Inc., 119 IBLA 76 (Apr. 5, 1991) 98 I.D. 207

Where more than 6 years have passed between the payment of Federal oil and gas royalty (and the generation of relevant documentation concerning the royalty) and the institution of an audit concerning the timeliness of the royalty payments, the time for the lessee to maintain records concerning the royalty has expired under 30 U.S.C. § 1713(b) (1988).

Where a lessee's successor in interest asserts that a lessee's admitted late payment of royalty was excused because the lessee was unaware that royalty in kind was no longer being taken and that royalty in value payments were therefore due, but the Government is able to show by contemporary evidence that the lessee did receive timely notice of the termination of the royalty in kind contract, MMS' decision imposing late payment

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

charges for the lessee's failure to pay royalty timely is properly affirmed.

Marathon Oil Co., 119 IBLA 345 (June 18, 1991)

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

Processing Allowance

Where a sour gas stream is processed by a lessee to yield methane, nitrogen, CO<sub>2</sub>, sulfur, and helium, and MMS limits a processing allowance to two-thirds of the value of nitrogen, CO<sub>2</sub>, and sulfur and denies any deduction against the value of methane, a residue gas, the agency decision will be reversed upon a showing that the

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Processing Allowance--Continued

allowance does not approximate the lessee's reasonable costs of manufacture. For onshore production occurring prior to Mar. 1, 1988, no basis exists in these circumstances to deny a deduction against the value of residue gas.

Exxon Corp., 118 IBLA 221 (Mar. 8, 1991) 98 I.D. 110

The term "treatment," as identified in 30 CFR 250.42 (1987), is the removal or extraction of chemical impurities or contaminants that must be removed in order for the gas to be of marketable quality or to place the gas in a marketable condition. "Sour gas" is gas contaminated by hydrogen sulfide or other sulphur compounds, which must be removed before the gas can be used for commercial and domestic purposes. The sulphur contaminants are not liquid hydrocarbons, so that their removal is not "processing" under 30 CFR 206.152 (1987). Removing the hydrogen sulfide (sweetening the gas) is "treatment" within the meaning of the regulations.

Exxon Co., U.S.A., Chevron U.S.A., Inc., 121 IBLA 234 (Nov. 15, 1991) 98 I.D. 409

Under 25 CFR 211.13 and 30 CFR 206.106 (1986), the processing allowance for royalty on products from wet gas is determined on the basis of actual costs, not to exceed two-thirds of the value of the produced liquids.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

## OIL AND GAS LEASES--Continued

### STIPULATIONS

Where a party executes stipulations to an oil and gas lease and yet challenges those stipulations stating that the lease will not be accepted if the stipulations are approved, such action is constructed as an execution under protest.

Where initial action has not been taken to deny or sustain protests against execution of stipulations to an oil and gas lease but the record establishes reasons for establishing stipulations as required and it is clear the protests would be denied if remanded for further review, the appeals may be adjudicated on their merits despite the absence of a formal rejection of the protests.

After the effective date of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, the Department lacks authority to reject lease stipulations recommended by the Secretary of Agriculture. For actions taken to require lease stipulations before the effective date of the Act, however, prior regulations require review of such stipulations by the Department.

Where an oil and gas lessee fails to show error in decisions imposing stipulations to oil and gas leases, the decisions are affirmed.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

### SUSPENSIONS

A suspension of a lease in order to allow more time for the drilling of a well cannot be authorized under 30 U.S.C. § 209 (1988), because a suspension under that section does not allow any lease activity. Nor can such a suspension be authorized under 30 U.S.C. § 226(f) (1988), when there is neither production nor a well capable of production. Where BLM has issued decisions purporting to grant suspensions and extensions of leases

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

that are unauthorized by law, the decisions are ultra vires and have no legal effect.

Ruby Drilling Co., 119 IBLA 210 (May 8, 1991)

TERMINATION

30 U.S.C. § 188(b) (1988), and 43 CFR 3108.2-1(b) require that a notice of deficiency be sent by the Secretary to an oil and gas lessee whose rental payment is paid on or before the anniversary date of the lease but in an amount nominally deficient. Where the regulation requires that this notice be served by certified mail, return receipt requested, it is not unreasonable to look to the party asserting delivery to produce positive proof of such event, e.g., by producing a signed return receipt card.

Petrolex 84-1 Ltd., 118 IBLA 372 (Mar. 14, 1991)

Where a noncompetitive oil and gas lessee fails to pay annual rental on or before the anniversary date of the lease and no oil or gas is being produced on the lease, the lease automatically terminates by operation of law. BLM may reinstate the lease pursuant to 43 CFR 3108.2-2(a) if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Where BLM approves an assignment of record title in an oil and gas lease to a party on May 12, well in advance of the June 1 anniversary date of the lease, lessee's assertion that she was unable to ascertain whether the assignment had been approved and where to mail the rental payment does not establish that the failure to pay rental timely was justified where she

## OIL AND GAS LEASES--Continued

### TERMINATION--Continued

admits that she knew of the approval on or prior to the due date for the payment.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the lease anniversary date does not constitute reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day on which the office is open) as required by the regulation at 43 CFR 3108.2-2(a).

Karl Mladinich, Victor Votaw, 120 IBLA 391 (Sept. 30, 1991)

### UNIT AND COOPERATIVE AGREEMENTS

A determination by the Bureau of Land Management to deny a proposal for an explanatory unit will not be set aside where there has not been a definite showing that the decision was in error. A difference in opinion on the interpretation of available information is not sufficient to show error.

Benson-Montin-Greer Drilling Corp., 118 IBLA 8 (Feb. 14, 1991)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

A suspension of a lease in order to allow more time for the drilling of a well cannot be authorized under 30 U.S.C. § 209 (1988), because a suspension under that section does not allow any lease activity. Nor can such a suspension be authorized under 30 U.S.C. § 226(f) (1988), when there is neither production nor a well capable of production. Where BLM has issued decisions purporting to grant suspensions and extensions of leases that are unauthorized by law, the decisions are ultra vires and have no legal effect.

Ruby Drilling Co., 119 IBLA 210 (May 8, 1991)

To the extent that a unit operator is delegated with all rights of the working interest owners with respect to allocation of production, receipt by the unit operator of a notice by BLM accepting the unit operator's determination that a well completion is noncommercial constitutes constructive service of that notice on the working interest owners.

Where, under a joint Federal/State unit agreement, authority for the approval of a noncommerciality determination is vested in the authorized officer, the New Mexico Land Commissioner, or the New Mexico Conservation Commission, depending upon whether the well in question is completed on Federal, State, or private land, respectively, a notice that BLM is filing a noncommerciality determination for a well not located on Federal land "for the record" does not constitute an appealable decision under 43 CFR 4.410.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

## OIL SHALE

### GENERALLY

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

## OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

### TIMBER SALES

The O&C Act makes clear that the primary use of O&C lands is for timber production to be managed in conformity with the principle of sustained yield. BLM did not err in construing the O&C Act as establishing timber production as the dominant use, notwithstanding the provisions of FLPMA calling for multiple use.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

## OUTER CONTINENTAL SHELF LANDS ACT (See also Oil & Gas Leases)

### OIL AND GAS LEASES

MMS' Procedure Paper concerning valuation of NGLP for royalty purposes was not required to be promulgated as a regulation because it does not constitute a substantive rule of law, as it neither creates law nor changes established policy. Rather, it simply clarifies the methodology for applying the factors set forth in

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

30 CFR 206.150 (1985), providing internal guidance for how this authority should be exercised.

The interpretation announced by MMS in its Procedure Paper concerning valuation of NGLP did not constitute a sudden change in policy such that its application violated appellant's due process rights and was arbitrary and capricious.

When MMS adopts an agency-wide interpretation that is reasonable and consistent with the law, the Board will affirm application of that interpretation. MMS' Procedure Paper concerning valuation of NGLP comports with 30 CFR 206.150 (1985), and MMS' reliance on it does not render its actions arbitrary and capricious.

Where the Department's regulations gave fair notice that royalty was due on NGLP, and in the absence of any well-established practice at odds with that announced in a Procedure Paper concerning valuation of NGLP at the time a party paid the royalties on NGLP, there is no bar to retroactive application of the Procedure Paper.

Where a party fails to provide an offer of proof regarding arm's-length contracts for NGLP in effect during the period at issue comparing its contract with the characteristics of arm's-length contracts, the yardstick price is properly applied in lieu of the non-arm's-length contract price. The contract price, even if applied, is subject to correction to remove impermissible deductions for manufacturing costs and location differential.

In valuing NGLP for royalty computation purposes, where the NGLP was sold under a non-arm's-length contract not shown to be comparable to arm's-length contracts that represent market value, MMS may properly use published spot market prices to establish value. However, the Board will set aside an MMS decision instructing a lessee (where the reported price falls below the lowest spot

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

market price) to use the average spot market price instead of the lowest spot market price.

Phillips Petroleum Co., 117 IBLA 255 (Jan. 10, 1991)

The inclusion in a transportation allowance for royalty oil of a return on capital assets based on the prime rate of interest may be sustained as reasonable, but where the date on which the prime rate is determined is inconsistent with prior applications of the rate upheld as reasonable, the case will be remanded to resolve the inconsistency.

Exxon Co., U.S.A., 119 IBLA 48 (Mar. 28, 1991)

The term "treatment," as identified in 30 CFR 250.42 (1987), is the removal or extraction of chemical impurities or contaminants that must be removed in order for the gas to be of marketable quality or to place the gas in a marketable condition. "Sour gas" is gas contaminated by hydrogen sulfide or other sulphur compounds, which must be removed before the gas can be used for commercial and domestic purposes. The sulphur contaminants are not liquid hydrocarbons, so that their removal is not "processing" under 30 CFR 206.152 (1987). Removing the hydrogen sulfide (sweetening the gas) is "treatment" within the meaning of the regulations.

The costs of "treatment" or other costs necessary to place the gas in marketable condition are not deductible or chargeable against the Federal royalty interest. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition. MMS' decision barring lessees from using an 88-percent price-reduction factor in the computation of royalty on natural gas will be affirmed where costs represented by the factor were incurred in the process of extraction of hydrogen

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

sulfide (sweetening), which was necessary to place the natural gas in marketable condition.

Exxon Co., U.S.A., Chevron U.S.A., Inc., 121 IBLA 234  
(Nov. 15, 1991) 98 I.D. 409

REFUNDS

An assessment of late payment charges for months in which a royalty payor underpaid royalties for natural gas produced and sold from an offshore oil and gas lease will be reversed where MMS approved a refund request for overpayment made during a specific time period including those months; the lease royalty account had a net surplus each month during the period; and the payments all occurred for a single lease.

Pogo Producing Co., 121 IBLA 270 (Nov. 18, 1991)

STATE LEASES

Generally

The holder of oil and gas leases issued for lands on the Outer Continental Shelf by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act must pay royalties in accordance with the provisions of the original State leases. Where the leases were issued on the 1942 Louisiana State lease form, which provides that the lessee pay to the lessor "sums equal to the value \* \* \* at the well [of one-eighth of all gas produced and saved or utilized], provided no gathering or other charges are made chargeable to lessor," the lessee is not permitted to

OUTER CONTINENTAL SHELF LANDS ACT--Continued

STATE LEASES--Continued

Generally--Continued

deduct transportation allowances from the amount on which royalty is calculated.

Exxon Co., U.S.A., 118 IBLA 30 (Feb. 21, 1991)

PATENTS OF PUBLIC LANDS

GENERALLY

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

EFFECT

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United

## PATENTS OF PUBLIC LANDS--Continued

### EFFECT--Continued

States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where the description of land in a patent issued under the Act of Mar. 3, 1851, 9 Stat. 631, differs from the description used in the decree of confirmation, the description in the patent controls over the description in the decree of confirmation, particularly where the initial Mexican concession was determined to be a grant of quantity rather than a grant of description.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)  
98 I.D. 321

### RESERVATIONS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

Where patents issued pursuant to the Act of July 17, 1914, as amended, reserve "all oil and gas and all shale or other rock valuable as a source of petroleum," that reservation is properly held to include

PATENTS OF PUBLIC LANDS--Continued

RESERVATIONS--Continued

sodium which occurs as an integral component of the reserved oil shale rock.

Shell Western E&P, Inc., 119 IBLA 125 (Apr. 22, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

SUITS TO CANCEL

The Department is barred by provision of 43 U.S.C. § 1166 (1988), from challenging the sufficiency of a patent issued to the widow of a homestead entryman in 1881, since more than 6 years have passed after the patent issued.

George H. Ruth, Robert E. Tudor, 121 IBLA 31 (Oct. 10, 1991)

PATENTS OF PUBLIC LANDS--Continued

SUITS TO CANCEL--Continued

The Department may consider a request to reinstate a relinquished Native allotment application for land which has been either patented or made part of an interim conveyance to a Native corporation. If the record shows that the possibility exists that the applicant involuntarily and unknowingly relinquished the application in whole or in part, or was fraudulently induced to do so, he is entitled an evidentiary hearing. If the relinquishment was not knowing and voluntary or was fraudulently procured, the Department may reinstate the application to adjudicate its validity prior to recommending the instigation of judicial proceedings to cancel conflicting interests in the land.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

#### PAYMENTS

(See also Accounts)

##### GENERALLY

MMS is authorized to impose a late payment charge when it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of the production of wet gas.

Phillips Petroleum Co., Phillips 66 Natural Gas Co.,  
121 IBLA 278 (Nov. 19, 1991)

Where royalty payments due on Federal oil and gas leases are not received by the Department on the date that such payments are due, or are less than the amount due, the Department is required by statute to charge interest on such late payments or underpayments. The MLA provides that interest charges collected on late payments under FOGDMA shall be paid into the Treasury of the United States, and that 50 percent thereof shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land or deposits are located. The statute clearly contemplates that the lessee must pay all royalties, including those that will ultimately be paid to the State, into the U.S. Treasury. The Board of Land Appeals is bound to follow such statute and is not at liberty to consider whether interest may be forgiven based upon equitable considerations.

Wexpro Co., 122 IBLA 1 (Dec. 26, 1991)

#### POWERSITE LANDS

Conveyance of lands previously withdrawn under the authority of sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (198), to a Native village pursuant to a selection made under the provisions provided by sec. 24 (1988),

#### POWERSITE LANDS--Continued

was subject to reservations provided by sec. 24 of the Federal Power Act.

Alaska Power Administration, 119 IBLA 301 (June 11, 1991)

#### PRACTICE BEFORE THE DEPARTMENT (See also Rules of Practice)

##### GENERALLY

Practice before the Board of Land Appeals is controlled by 43 CFR 1.3. An appeal brought by a person who does not qualify to practice under one of the provisions is subject to dismissal. The person filing an appeal has the responsibility of showing that he is qualified under the regulation.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

##### PERSONS QUALIFIED TO PRACTICE

An appeal brought by a person who has not shown that he is qualified under 43 CFR 1.3 to represent the party issued and adversely affected by a trespass notice is properly dismissed.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

## PRIVATE LAND CLAIMS

### GENERALLY

Where the description of land in a patent issued under the Act of Mar. 3, 1851, 9 Stat. 631, differs from the description used in the decree of confirmation, the description in the patent controls over the description in the decree of confirmation, particularly where the initial Mexican concession was determined to be a grant of quantity rather than a grant of description.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)  
98 I.D. 321

## PUBLIC LANDS

(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands)

### GENERALLY

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

## PUBLIC LANDS--Continued

### GENERALLY--Continued

The Secretary of the Interior is authorized and obligated to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. An island, whether located in navigable or nonnavigable waters, that is omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existence and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management,  
118 IBLA 38 (Feb. 21, 1991)

### ADMINISTRATION

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

## PUBLIC LANDS--Continued

### ADMINISTRATION--Continued

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

### CLASSIFICATION

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

PUBLIC LANDS--Continued

DISPOSALS OF

Generally

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

The Secretary of the Interior has the discretionary authority to grant an application to purchase public lands under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 to 869-4 (1988). A decision rejecting such an application for land to be used as a bicycle rest area will be set aside where BLM fails to provide a rational basis for its determination that the proposed use of the land as shown in the development and management plans for the project does not justify disposal of the land to appellant.

The City of Chico, 119 IBLA 136 (Apr. 23, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to

PUBLIC LANDS--Continued

DISPOSALS OF--Continued

Generally--Continued

show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

JURISDICTION OVER

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

LEASES AND PERMITS

After a conveyance of reserved mineral interests under sec. 209 of FLPMA, 43 U.S.C. § 1719 (1988), was made, subject to an existing geothermal lease which the United States also conveyed all its interest, the United States could no longer collect rental accruing to the conveyed portion of the lease.

Julian F. Knox, Nancy H. Knox, 119 IBLA 116 (Apr. 22, 1991)

## PUBLIC LANDS--Continued

### RIPARIAN RIGHTS

The Secretary of the Interior is authorized and obligated to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. An island, whether located in navigable or nonnavigable waters, that is omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existence and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management,  
118 IBLA 38 (Feb. 21, 1991)

### SPECIAL USE PERMITS

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309  
(Jan. 23, 1991)

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

American Motorcycle Ass'n, District 37, 119 IBLA 196 (May 7, 1991)

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

## PUBLIC LANDS--Continued

### SPECIAL USE PERMITS--Continued

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

The issuance of a special recreation use permit is discretionary, and, where necessary to avoid adverse impacts on wildlife, BLM may restrict use on the Rio Grande River during the period it is revising a management plan for the river, by issuing a limited number of special recreation permits. Where appellant does not show that the authorized officer's decision was unreasonable, BLM's decision will be affirmed.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

## PUBLIC SALES

### GENERALLY

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

PUBLIC SALES--Continued

SALES UNDER SPECIAL STATUTES

The O'Konski Act is a remedial Act intended to correct a recognized error resulting from fraudulent or grossly erroneous cadastral surveys and allows those Wisconsin property owners who have, since Jan. 21, 1953, been in good faith and in peaceful and open possession of lands lying between the originally determined meander line and the actual meander line an opportunity to acquire omitted lands in the same manner as the land would have been acquired if the original survey had been accurate. Being remedial, the O'Konski Act should be liberally construed in favor of those entitled to its benefits.

To qualify under the O'Konski Act, the applicant must show that the land lying between the originally determined meander line and the actual meander line was held in good faith and in peaceful, adverse possession prior to Jan. 21, 1953. A break in the chain of title prior to Jan. 21, 1953, will not be a basis for rejection of an O'Konski application, so long as there has been no break in chain of title since that date.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

Applicants who timely showed that they were owners of land in Wisconsin lying along a meander line, subsequently resurveyed, who held down lands between the original meander and the water shown on the later survey and have, since Jan. 21, 1953, held the land in good faith and peaceful adverse possession, were entitled to purchase it under the Act of Aug. 24, 1954, known as the O'Konski Act, 43 U.S.C. § 1221 (1988).

Victor A. Markunas, Victoria E. Markunas, 119 IBLA 70 (Apr. 1, 1991)

#### RAILROAD GRANT LANDS

Pursuant to 43 CFR 2631.1, the Department may require applicants for patent under the Transportation Act of 1940 to provide specific proof of transfer of title.

"Innocent purchaser for value." The phrase "innocent purchaser for value" appearing in the Transportation Act of 1940 does not refer to a subjective state of mind, but indicates instead the absence of knowledge of mineral character of land sold by a land grant railroad.

Lands may be mineral in character even though there has been no discovery of a valuable mineral on the land itself: external conditions may give mineral character to a tract. In railroad grant lands cases, mineral character is to be determined as of the time when the land was covered by the railroad.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

#### RECREATION AND PUBLIC PURPOSES ACT

The Secretary of the Interior has the discretionary authority to grant an application to purchase public lands under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 to 869-4 (1988). A decision rejecting such an application for land to be used as a bicycle rest area will be set aside where BLM fails to provide a rational basis for its determination that the proposed use of the land as shown in the development and management plans for the project does not justify disposal of the land to appellant.

The City of Chico, 119 IBLA 136 (Apr. 23, 1991)

#### RECREATION AND PUBLIC PURPOSES ACT--Continued

Terms and conditions may be imposed in a Recreation and Public Purposes Act lease for the proper development of the land, for the protection of Federal property, and for the protection of the public interest. 43 CFR 2912.1-1(b). The public interest includes use of the public lands in a manner that does not unreasonably interfere with adjacent private uses.

Where BLM denies a protest against the relocation of a road and approves an amendment of the approved plan of development for a lease issued under the Recreation and Public Purposes Act to relocate the road, holding that dust from the relocated road will not unreasonably interfere with private use of adjacent lands for growing produce, its decisions are properly set aside and remanded where the record indicates that dust from the relocated road may render produce grown on adjacent private lands unmarketable. On remand, BLM should consider approving the amendment subject to a conditional protective stipulation that would require additional action to be taken to reduce dust from the road (such as using a dust retarding agent or sprinkling) only if it is shown that produce is being damaged by dust.

Lloyd & Sue Heger, 121 IBLA 321 (Dec. 10, 1991)

#### REGULATIONS

(See also Administrative Procedure)

##### GENERALLY

A change in regulations governing the acquisition of lands in trust status should not be applied retroactively to a matter pending before the Bureau of Indian Affairs when the person affected detrimentally relied upon the policy and procedures that were in place at the time the trust acquisition was approved.

Georgiana Kautz v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 305 (Apr. 18, 1991)

REGULATIONS--Continued

GENERALLY--Continued

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs, 21 IBIA 11 (Oct. 8, 1991)

The Departmental regulation applicable to payment to the United States for logging road use, 43 CFR 2812.5-2(b), provides that where a right-of-way permittee receives a right to use a road constructed or acquired by the United States, which is under the administrative jurisdiction of BLM, the permittee will be required to pay a fee the amount of which is to be determined by the authorized officer. Where BLM denies a request that certain roads utilized for timber hauling be designated as tie roads and, thus, exempt from the payment of fees, that decision will be affirmed where the record shows that it was based on a reasoned analysis of the facts made with due regard for the public interest, and the permittee fails to show error in BLM's determination.

Northwest Timber Affiliates, Inc., 121 IBLA 42 (Oct. 22, 1991)

## REGULATIONS--Continued

### APPLICABILITY

Under the regulations governing bonds for oil and gas geophysical exploration, liability for a particular oil and gas geophysical exploration operation automatically terminates by operation of law on the 91st day following the filing of a notice of completion of oil and gas exploration operations if BLM fails to notify the party filing the notice within 90 days of the filing that all terms and conditions have been met or that additional action is required to rehabilitate the lands. Where BLM fails to provide such notice and a number of years later seeks to collect on the nationwide oil and gas geophysical exploration bond for the costs of correcting improperly plugged shot holes, the regulation precludes such collection.

Insurance Co. of North America, 120 IBLA 384 (Sept. 25, 1991)

### BINDING ON THE SECRETARY

The Department of the Interior is bound by its own properly promulgated regulations which have the force and effect of law.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

### FORCE AND EFFECT AS LAW

The Department of the Interior is bound by its own properly promulgated regulations which have the force and effect of law.

Kiowa Tribe v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 157 (Jan. 22, 1991)

## REGULATIONS--Continued

### FORCE AND EFFECT AS LAW--Continued

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

### INTERPRETATION

After the effective date of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, the Department lacks authority to reject lease stipulations recommended by the Secretary of Agriculture. For actions taken to require lease stipulations before the effective date of the Act, however, prior regulations require review of such stipulations by the Department.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

### VALIDITY

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

ANR Production Co., 118 IBLA 338 (Mar. 12, 1991)

REGULATIONS--Continued

VALIDITY--Continued

BLM properly refused to accept an assignment of record title to an oil and gas lease filed on a form previously declared obsolete by the Director, BLM, by notice published in the Federal Register pursuant to Departmental regulation 43 CFR 3106.4-1.

E. Barger Miller, III, 120 IBLA 177 (July 26, 1991)

RENT

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

RENT--Continued

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

RES JUDICATA

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

RES JUDICATA--Continued

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)  
98 I.D. 321

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

RIGHTS-OF-WAY

(See also Indians, Reclamation Lands)

GENERALLY

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that a right-of-way is subject to cost recovery, Category I, has the burden of establishing by a preponderance of the evidence that the BLM determination is incorrect.

Joe B. Kearl, 119 IBLA 122 (Apr. 22, 1991)

The Departmental regulation applicable to payment to the United States for logging road use, 43 CFR 2812.5-2(b), provides that where a right-of-way permittee receives a right to use a road constructed or acquired by the United States, which is under the administrative jurisdiction of BLM, the permittee will be required to pay a fee the amount of which is to be determined by the authorized officer. Where BLM denies a request that certain roads utilized for timber hauling be designated as tie roads and, thus, exempt from the payment of fees, that decision will be affirmed where the record shows that it was based on a reasoned analysis of the facts made with due regard for the

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

public interest, and the permittee fails to show error in BLM's determination.

Northwest Timber Affiliates, Inc., 121 IBLA 42 (Oct. 22, 1991)

ACT OF JANUARY 21, 1895

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

APPLICATIONS

A decision rejecting a right-of-way application for an access road will be affirmed where granting the right-of-way would be inconsistent with applicable law and not in the public interest. Application for an access road right-of-way was properly rejected where the water well to which access was sought was neither the subject of an approved mining plan of operations nor authorized through issuance of a right-of-way grant or temporary use permit.

George Bernadot, 121 IBLA 138 (Oct. 28, 1991)

## RIGHTS-OF-WAY--Continued

### APPRAISALS

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

Western Nuclear, Inc., 117 IBLA 281 (Jan. 16, 1991)

A BLM increase in the annual rental charge for a communications site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market value of the right-of-way by the comparable lease method of appraisal.

Questar Service Corp., 119 IBLA 65 (Mar. 29, 1991)

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Oregon Broadcasting Co., 119 IBLA 241 (May 15, 1991)

A right-of-way grant for a water pipeline issued in 1990 pursuant to regulations published at 43 CFR Part 2800, implementing the Federal Land Policy and Management Act of 1976, was made subject to payment of rental under 43 CFR 2803.1-2(a).

Kevin C. Kehoe, 119 IBLA 257 (May 16, 1991)

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

AMAX Magnesium, 119 IBLA 281 (June 6, 1991)

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where BLM is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

Communications Enterprises, Inc., 120 IBLA 146 (July 16, 1991)

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

Idaho Wireless Corp., 120 IBLA 172 (July 23, 1991)

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

First Broadcasting of Nevada, Inc., 120 IBLA 240 (Aug. 9, 1991)

## RIGHTS-OF-WAY--Continued

### APPRAISALS--Continued

Under the relevant regulation, the comparable lease method of appraisal is the preferred method for determining the fair market value of a nonlinear right-of-way such as a communication site. Under this method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. An appraisal based simply on application of the consumer price index to a prior appraisal without any analysis of comparable leases is properly remanded as inconsistent with the regulatory standard.

KSEL, Inc., 120 IBLA 266 (Aug. 21, 1991)

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

The holder of a right-of-way grant for a salt water disposal site is required to pay annually, in advance, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. In accordance with 43 CFR 2803.1-2(c)(3)(i), rental for non-linear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels.

A BLM decision adjusting the rental for a salt water disposal site right-of-way from a per acre fee to a fee per barrel of disposed water will be affirmed where the adjusted rental is based on a market survey of

#### RIGHTS-OF-WAY--Continued

##### APPRAISALS--Continued

comparable salt water disposal leases which indicates that a per barrel fee is utilized in the market place to determine rentals, and the appellant has neither demonstrated error in that methodology nor shown that the rental charges are excessive.

Laguna Gatuna, Inc., 121 IBLA 302 (Dec. 3, 1991)

##### CANCELLATION

It is proper for BLM to cancel a reservoir right-of-way grant pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1766 (1988), when the grantee fails to obtain a performance bond required by the grant, after having been given notice and a reasonable time to comply.

Robert A. Erkins, 121 IBLA 61 (Oct. 25, 1991)

##### CONDITIONS AND LIMITATIONS

Under 25 CFR 169.19, the renewal of a right-of-way across individually owned Indian land requires the consent of the owners of a majority of the interests in the land.

The owner of an interest in individually owned Indian land may withdraw his/her consent to a right-of-way at any time prior to the granting of the right-of-way easement by the Bureau of Indian Affairs.

Nellie Moccasin v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 184 (Feb. 5, 1991)

RIGHTS-OF-WAY--Continued

CONDITIONS AND LIMITATIONS--Continued

BLM properly declines to condition a grant of a slurry pipeline right-of-way on a requirement that the pipeline be operated as a common carrier for the benefit of other producers of phosphate ore where no statute requires such operation and there is no demonstration that such a condition is necessary to protect competition, future development of phosphate reserves, or the environment.

John D. Archer, 120 IBLA 290 (Sept. 6, 1991)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Although 43 CFR 2801.1-2 authorizes BLM to require that a road right-of-way applicant grant a reciprocal right-of-way to the United States as a condition to receiving a right-of-way pursuant to sec. 501(a) of FLPMA, 43 U.S.C. 1761(a) (1988), the reciprocal grants must be equivalent, and a BLM decision denying an application for the assignment of a road right-of-way, based on the purported refusal of the assignee to grant public access across his private land, will be vacated because a FLPMA right-of-way does not grant public access.

Charles Ryden, 119 IBLA 277 (June 6, 1991)

It is proper for BLM to cancel a reservoir right-of-way grant pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1766 (1988), when the grantee fails to obtain a performance bond required by the grant, after having been given notice and a reasonable time to comply.

Robert A. Erkins, 121 IBLA 61 (Oct. 25, 1991)

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

Salt River Project, 121 IBLA 185 (Nov. 5, 1991)

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of FLPMA, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

Star Lake Railroad Co., 121 IBLA 197 (Nov. 13, 1991)  
98 I.D. 398

OIL AND GAS PIPELINES

Under 25 CFR 169.19, the renewal of a right-of-way across individually owned Indian land requires the consent of the owners of a majority of the interests in the land.

## RIGHTS-OF-WAY--Continued

### OIL AND GAS PIPELINES--Continued

The owner of an interest in individually owned Indian land may withdraw his/her consent to a right-of-way at any time prior to the granting of the right-of-way easement by the Bureau of Indian Affairs.

Nellie Moccasin v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 184 (Feb. 5, 1991)

## RULES OF PRACTICE

(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department)

### GENERALLY

The Department's regulations implementing the EAJA provide a two-tier adjudicatory procedure in which an application for an award of fees and expenses is filed with the adjudicative officer who presided at the adversary adjudication, and the decision of that officer on the application is then appealable to the appropriate appeals board. When an application is filed in the first instance with the Board of Land Appeals, it will ordinarily be transferred to the appropriate adjudicative officer; however, where, as a matter of law, the application must be denied, the Board may adjudicate the application, since transfer of the application would serve no useful purpose.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

RULES OF PRACTICE--Continued

GENERALLY--Continued

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)  
98 I.D. 321

## RULES OF PRACTICE--Continued

### GENERALLY--Continued

To the extent that a unit operator is delegated with all rights of the working interest owners with respect to allocation of production, receipt by the unit operator of a notice by BLM accepting the unit operator's determination that a well completion is noncommercial constitutes constructive service of that notice on the working interest owners.

Where, under a joint Federal/State unit agreement, authority for the approval of a noncommerciality determination is vested in the authorized officer, the New Mexico Land Commissioner, or the New Mexico Conservation Commission, depending upon whether the well in question is completed on Federal, State, or private land, respectively, a notice that BLM is filing a noncommerciality determination for a well not located on Federal land "for the record" does not constitute an appealable decision under 43 CFR 4.410.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

### APPEALS

#### Generally

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not described in the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a factfinding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Mitchell Allen, 117 IBLA 330 (Jan. 24, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Where an oil and gas lessee fails to show error in decisions imposing stipulations to oil and gas leases, the decisions are affirmed.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

Any party appealing from a decision of an officer of the Bureau of Land Management has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

When the record does not confirm that a lessee has been assigned or assumed legal responsibility for making royalty payments on behalf of co-lessees, an MMS decision directing the lessee to recalculate the royalties for all co-lessees will be set aside and the case remanded for recalculation by the appropriate party or parties.

Phillips Petroleum Co., Phillips 66 Natural Gas Co., 121 IBLA 278 (Nov. 19, 1991)

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Board of Land Appeals

Where an oil and gas lessee fails to show error in decisions imposing stipulations to oil and gas leases, the decisions are affirmed.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

#### Burden of Proof

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Feb. 6, 1991) 98 I.D. 23

When an appellant merely urges some other course of action which may be theoretically as correct as that chosen by BLM, this Board will not overturn a BLM decision to gather excess wild horses. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. In cases involving an expert's interpretation of data, it is not enough that the party objecting to the determination demonstrates that another course of action or interpretation is available or that the proposed course

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

of action is also supported by the evidence. The appellant must demonstrate by the preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion.

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that a right-of-way is subject to cost recovery, Category I, has the burden of establishing by a preponderance of the evidence that the BLM determination is incorrect.

Joe B. Kearl, 119 IBLA 122 (Apr. 22, 1991)

Dismissal

An appeal may properly be dismissed as moot where the Board can grant no further relief because of events occurring subsequent to the appeal.

Animal Protection Institute of America, 118 IBLA 20 (Feb. 15, 1991)

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Dismissal--Continued

An appeal is properly dismissed as moot if, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant and no reasonable expectation or demonstrated probability that the same controversy will again occur involving the same complaining party. Where an appeal was taken in reliance on a provision of law appearing in an annual appropriations act prohibiting export of unprocessed timber from Federal lands, but the provision appearing in the appropriations act was later replaced by a more detailed statute, the probability the same controversy will be repeated is slight.

Oregon Cedar Products Co., 119 IBLA 89 (Apr. 9, 1991)

Pursuant to the applicable Departmental regulations, an appeal is subject to summary dismissal where a SOR in support of the appeal is not included in the notice of appeal and is not filed within 30 days after the filing of the notice of appeal. Similarly, a SOR filed in support of an appeal which does not affirmatively point out in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal is also subject to dismissal.

Where an individual or organization fails to protest action proposed to be taken by BLM, such an entity has no standing to appeal from the denial of a protest filed by some other individual or organization.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Refusal to accept personal delivery of a BLM decision does not vitiate service of the decision. A notice of appeal transmitted more than 30 days after personal service of the decision being appealed is untimely and the appeal must be dismissed.

Humane Society of Southern Nevada, 119 IBLA 216 (May 13, 1991)

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Board's jurisdiction, under the Contract Disputes Act of 1978.

Appeal of Blaze Construction Co., Inc., IBCA-2863  
(June 6, 1991) 98 I.D. 213

An appeal brought by a person who has not shown that he is qualified under 43 CFR 1.3 to represent the party issued and adversely affected by a trespass notice is properly dismissed.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is not an appealable decision. An appeal from such a letter will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Certification of multiple claims by a division manager under a contract for the construction, inter alia, of a pumping plant is found to be inadequate for the purpose of vesting jurisdiction in the Board over the claims in issue where appellants assert that the division manager qualifies as a senior company official in charge at the contractor's plant or location involved but the evidence offered fails to establish that the division manager had primary responsibility for the execution of the contract and that he had a physical presence at the location of the primary contract activity.

Certification of multiple claims by an assistant vice president of a surety company that completed the contract work is found to be inadequate for the purpose of vesting the Board with jurisdiction over the claims in issue where appellants assert that the assistant vice president had authority to bind the surety company and to certify the claims but make no attempt to show that the assistant vice president who certified the claimson behalf of the surety had overall responsibility for the conduct of the contractor's affairs in general.

Besides moving to dismiss the instant appeals for lack of proper certification, the Government has also moved to dismiss two of the claims involved (captioned "Maladministration" and "Incidental Impact Expenses") on the ground that such claims were never presented to the contracting officer for decision. The Board finds, however, that the two claims in question were presented to and decided by the contracting officer and that subject to proper certification at the time of resubmission they may again be presented to the contracting officer in their present form for his consideration and decision.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Dismissal--Continued

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

Pursuant to 43 CFR 3185.1 and 43 CFR 3165.3, where a party to a unit agreement files a request for technical and procedural review by a State Director of BLM, the request is properly dismissed as untimely pursuant to 43 CFR 3165.3(b) when it is filed more than 20 business days after the date the decision of the authorized officer was received or deemed to be received by the aggrieved party.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

#### Effect\_of

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect\_of--Continued

not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

As a general rule, the effect of a decision is stayed pending an opportunity for administrative review of the decision pursuant to the appeal regulation at 43 CFR 4.21(a). An exception is recognized with respect to decisions regarding the readjusted terms (including royalty rate) of coal leases where the relevant regulation provides that the decision shall be effective as of the lease anniversary date regardless of whether an appeal is filed.

Atlantic Richfield Co., et al., 121 IBLA 373 (Dec. 19, 1991) 98 I.D. 429

Failure to Appeal

When BLM determines in its land-use planning process to remove wild horses from a grazing allotment and, following notice to interested parties, implements that plan, a challenge to a subsequent BLM decision allocating grazing use in the allotment, by a party who received notice of the removal, on the basis that wild horses were improperly removed and should be relocated into the allotment, is untimely.

Animal Protection Institute of America, 120 IBLA 342 (Sept. 12, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings

Where the record on appeal presents unresolved questions of fact or undecided, significant legal issues, under 43 CFR 4.415 the Board of Land Appeals has discretionary authority to refer the matter for a hearing.

Jerome P. McHugh & Associates (On Reconsideration),  
117 IBLA 303 (Jan. 17, 1991)

A second hearing will not be afforded if an appellant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

Where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an ALJ pursuant to 43 CFR 4.470, and wild horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild horse appeal may properly be referred to the ALJ to the extent it involves factual issues for hearing and consideration together with the grazing appeal.

Animal Protection Institute of America, Roy Shurtz,  
118 IBLA 345 (Mar. 13, 1991)

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Hearings--Continued

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

William J. Thoman v. Bureau of Land Management, Roberts Ranch et al. (Intervenors), 120 IBLA 302 (Sept. 9, 1991)

The relinquishment of a Native allotment application must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. In determining whether there is a factual issue whether the relinquishment of a Native allotment application was knowing and voluntary so as to require a hearing, the Board will regard as true the factual allegations made in affidavits filed in support of a request for reinstatement.

Heir of Frank Hobson (On Reconsideration), 120 IBLA 66 (Oct. 25, 1991)

#### Jurisdiction

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

When, in submitting a claim to the contracting officer in excess of \$50,000, the contractor failed to certify that "the supporting data are accurate and complete to the best of his knowledge and belief," the certification did not meet the requirements of the Contract Disputes Act of 1978. The facts that the Board suspected the omission was due to typographical error, and that the contractor otherwise certified to more than was necessary, were irrelevant. The Board could not

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Jurisdiction--Continued

supply the missing certification requirement by inference. Due to the defective certification, the Board did not possess jurisdiction to entertain the contractor's appeal from the contracting officer's failure to render a decision on the claim.

Appeal of Rock Point Community School Board, IBCA-2953  
(Oct. 29, 1991) 98 I.D. 355

#### Motions

Although the Board has jurisdiction over the contractor's appeals, the Government carried the burden of proof necessary to sustain its motion to suspend Board proceedings pending the resolution of a civil fraud action against appellant. The alleged fraud is intertwined with the contractor's submission of its claims, their nature, amount, and the facts it asserts in support. The Board is unable to segregate portions of the claims potentially involving a determination of liability for fraud, in which the Board will not engage, 41 U.S.C. § 605(a), from other portions of the claims. Also, it would be contrary to the efficient and economic resolution of the related controversies between the parties to proceed in two fora simultaneously.

Appeals of Hardrives, Inc., IBCA-2319 et al. (Feb. 6,  
1991) 98 I.D. 23

The Government's motion to dismiss appellant's appeals for lack of jurisdiction, because they were filed more than 3 years after appellant's original appeal, based upon the same allegations, was dismissed without prejudice, is denied. The Board's Rule 4.127(a), requiring reinstatement within 3 years of an appeal dismissed without prejudice because it was in a suspense status, is procedural, and not part of the

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

jurisdictional constraints of the Contract Disputes Act of 1978. Moreover, the Rule is inapplicable. Appellant's former appeal was not dismissed because it was in a suspense status. It was dismissed for failure to certify the underlying claim, rendering that claim a legal nullity. Thus, the present appeals are not "reinstated." They are new appeals based upon legally new claims.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (May 31, 1991) 98 I.D. 210

The Government's motion to dismiss appellant's claims that the Government failed to protect appellant's rights under its lease from Hopi Indians of a construction yard and sand pit site is sustained. The Government was not a party to the lease. Thus, the lease claims are not based upon a contract with the Government, a prerequisite to a cause of action, and to the Board's jurisdiction, under the Contract Disputes Act of 1978.

Appellant's allegations that the Government breached an implied duty to cooperate under its road contract with appellant, of differing site conditions, and of entitlement to equitable contract reformation, arise from the same set of operative facts presented to the contracting officer in appellant's claim and the Board has jurisdiction to consider them.

Appeal of Blaze Construction Co., Inc., IBCA-2863 (June 6, 1991) 98 I.D. 213

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Motions--Continued

It is proper for an Administrative Law Judge to deny a motion to set aside a BLM decision reducing authorized livestock grazing use because BLM failed to forward the appeal from that decision to the State Director for several months. The Department's regulations do not require BLM to forward the appeal within a time certain or impose a specific sanction for failure to promptly forward the appeal. There was no showing that appellants sustained injury by reason of the delay or that appellants were diligent in their efforts to have their files forwarded at an earlier date and thus no compelling reason for the Administrative Law Judge to exercise his discretionary authority to impose sanctions.

Reed B. Robison, RO Livestock v. Bureau of Land Management, 120 IBLA 181 (July 26, 1991)

The 90-day appeal period established by the Contract Disputes Act of 1978 is a statutory limitation upon jurisdiction and cannot be waived by the Board. In the area of timeliness of a contractor's appeal, that is the only jurisdictional limitation upon the Board's ability to accept appeals.

Unlike the 90-day filing limitation, the portion of the Board's rule 4.102(a) seeking an original and two copies of an appeal is not jurisdictional. It is procedural. It is always within the Board's discretion to relax or modify that part of the rule in the interests of justice.

The Government's motion to dismiss the contractor's appeals as untimely is denied when the appeals were telefaxed to the Board, received in full, and filed by the Recorder of the Board, within the statutory time period prescribed by the Contract Disputes Act of 1978. Although the Board does not encourage appeals by telefax, and a contractor telefaxes at its own risk, the Board will accept a telefaxed appeal if it is received

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Motions--Continued

in full, by an individual authorized to receive it on behalf of the Board, before the filing period expires, provided the Board receives the identical original hard copy within a reasonable time thereafter.

Appeals of J. C. Equipment Corp., IBCA-2885-89 (Aug. 19, 1991) 98 I.D. 253

#### Notice of Appeal

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

#### Protests

Where a party executes stipulations to an oil and gas lease and yet challenges those stipulations stating that the lease will not be accepted if the stipulations are approved, such action is constructed as an execution under protest.

Where initial action has not been taken to deny or sustain protests against execution of stipulations to an oil and gas lease but the record establishes reasons for establishing stipulations as required and it is clear the protests would be denied if remanded for further review, the appeals may be adjudicated on their merits

RULES OF PRACTICE--Continued

APPEALS--Continued

Protests--Continued

despite the absence of a formal rejection of the protests.

Liberty Petroleum Corp., 118 IBLA 214 (Mar. 7, 1991)

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

Standing to Appeal

Where a State of Alaska protest against a Native allotment under sec. 905 of the Alaska National Interest Lands Conservation Act was granted in 1982 and, as a result, the allotment was adjudicated pursuant to the Alaska Native Allotment Act of 1906, no further adjudication of the allotment was required. In the absence of a timely appeal of the decision approving the allotment, the doctrine of administrative finality precludes review of the allotment on appeal from a subsequent decision.

State of Alaska (Henry J. Ekada), 117 IBLA 373 (Feb. 7, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Determinations of judicial standing do not control adjudications of administrative standing. Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a).

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

While the principal means by which a person becomes a "party to a case" within the meaning of 43 CFR 4.410(a) is to actively participate in the decision-making process which leads to the appeal, it is not the only means. Where BLM approves a Native allotment application on National Park System lands and the National Park Service files an appeal of that decision, the status of the National Park Service as the agency charged with administrative responsibilities for the management of such lands satisfies the "party to a case" requirement of 43 CFR 4.410(a).

National Park Service, 118 IBLA 204 (Mar. 6, 1991)

Where an individual or organization fails to protest action proposed to be taken by BLM, such an entity has no standing to appeal from the denial of a protest filed by some other individual or organization.

Burton A. & Mary H. McGregor et al., 119 IBLA 95 (Apr. 15, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Standing to appeal a decision to the Board requires that an appellant be a party to the case adversely affected by the decision appealed. An assignee who has filed an application for approval of an assignment of a coal lease lacks standing to appeal a decision finding the assignment subject to approval on provision of a lease bond where the bond requirement is not contested.

G. H. Allen et al., 119 IBLA 272 (May 30, 1991)

A party filing a notice of appeal of a decision to convey land under the Alaska Native Claims Settlement Act is required to file a statement of standing within 30 days of filing a notice of appeal. If a statement of standing is not filed, the appeal is subject to summary dismissal. Discretion to dismiss an appeal for failure to timely file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that the procedural deficiency has prejudiced an adverse party.

In relation to a decision to convey land under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1988), the phrase "land affected by the decision" in 43 CFR 4.410(b) refers to the land to be conveyed. Land which is near or adjacent to the land to be conveyed is not "land affected by the decision." Because the reason for reserving a public easement under subsec. 17(b)(1) of ANCSA is to provide access to lands not conveyed, a different rule applies to decisions concerning easements.

Robert A. Perkins, 119 IBLA 375 (June 28, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

The existence of a BLM decision, adverse to a party to a case, is necessary to provide standing to appeal to the Board of Land Appeals under 43 CFR 4.410(a). An appealable decision takes or prohibits some action. A letter restating and summarizing Departmental policy that was put into effect by prior planning documents is not an appealable decision. An appeal from such a letter will be dismissed.

Joe Trow, 119 IBLA 388 (July 3, 1991)

When the Board affirms a BLM decision dismissing a protest challenging the validity of a Native allotment application because the protest was not filed within 180 days after the effective date of ANILCA, and the Native allotment is legislatively approved pursuant to sec. 905(a)(1) of ANILCA, the doctrine of administrative finality precludes a subsequent appeal challenging the validity of the Native allotment when the decision appealed from was issued to conform the Native allotment to BLM's survey of the allotment.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

The assignee of an unapproved assignment of a right-of-way has standing to appeal from a decision increasing the rental of the right-of-way.

Uno Broadcasting Corp., 120 IBLA 380 (Sept. 23, 1991)

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Standing to Appeal--Continued

In a case where appellants allude to subrogation claims but fail to identify or quantify them or to show that they were presented to the contracting officer for decision, the Board finds that it is without jurisdiction in the matter. The Board notes, however, that even if subrogation claims (properly certified, if required) cognizable as claims under the CDA had been presented to the contracting officer, appellant Federal, as surety, could only recover on such claims if it is shown that the obligations of its principal had been fully satisfied.

Where appellants assert that the completing surety should be recognized as the "contractor" by reason of a de facto takeover agreement but acknowledge that there was no formal takeover agreement and fail to point to any agreement with the Government following the contractor's default on which they rely as a takeover agreement, the Board finds that the surety is without standing to bring this appeal in its own name under the line of cases where takeover agreements were found to exist.

In addition to moving to dismiss the appeals by reason of improper certification, the Government has also moved to dismiss Federal as a party to the instant appeals on the ground that as a surety it is not a contractor within the meaning of sec. 601(4) of the CDA. Subject to proper certification of the claims upon resubmission thereof, the Board finds that the Government was aware of, assented to, and recognized the assignment and that the effect of such recognition was to waive the anti-assignment statutes, to make lawful the substitution of the surety for the contractor, and to give standing to the surety to prosecute the instant appeals in its own name as the "contractor" within the meaning of the CDA.

Appeals of Rodgers Construction, Inc., Federal Insurance Co., IBCA-2777 et al. (Oct. 15, 1991) 98 I.D. 281

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

In order to establish standing to appeal under the provisions of 43 CFR 4.410, one must be a party to a case and must assert a cognizable interest which was adversely affected by the decision sought to be appealed.

The fact that a question may have been the subject of a prior Departmental decision will not prevent a party from establishing standing to appeal a subsequent decision to adhere to the prior precedent, where that party was not a participant in the prior decision.

State of California et al., 121 IBLA 73 (Oct. 28, 1991)  
98 I.D. 321

The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

State of Alaska (Anna Nick), 121 IBLA 155 (Oct. 31, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363  
(Dec. 19, 1991)

Statement of Reasons

Pursuant to the applicable Departmental regulations, an appeal is subject to summary dismissal where a SOR in support of the appeal is not included in the notice of appeal and is not filed within 30 days after the filing of the notice of appeal. Similarly, a SOR filed in support of an appeal which does not affirmatively point out in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal is also subject to dismissal.

Burton A. & Mary H. McGregor et al., 119 IBLA 95  
(Apr. 15, 1991)

Any party appealing from a decision of an officer of the Bureau of Land Management has the burden of establishing error in the decision under appeal, by a preponderance of the evidence. Conclusory allegations of error, standing alone, do not discharge this burden.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Reasons--Continued

If an appellant's notice of appeal did not include a SOR for the appeal, the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. Where no SOR is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Sybil W. Taylor, 120 IBLA 193 (July 30, 1991)

A decision by BLM may be summarily affirmed where the statement of reasons filed in support of an appeal fails to point out error in the decision under review but instead merely reiterates arguments addressed to BLM in a protest and where the BLM decision on the protest is comprehensive and fully addresses each of the arguments contained in the protest.

In re Mill Creek Salvage Timber Sale, 121 IBLA 360 (Dec. 18, 1991)

Timely Filing

An untimely appeal from the rejection of an Indian allotment application must be dismissed.

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 254 (Mar. 8, 1991)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely\_Filing--Continued

Refusal to accept personal delivery of a BLM decision does not vitiate service of the decision. A notice of appeal transmitted more than 30 days after personal service of the decision being appealed is untimely and the appeal must be dismissed.

Humane Society of Southern Nevada, 119 IBLA 216 (May 13, 1991)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board of Land Appeals). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with the Board, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Thelma M. Eckert, 120 IBLA 367 (Sept. 18, 1991)

Under 25 CFR 166.6, stocking rates on Indian range units are to be monitored and adjusted as conditions warrant. Accordingly, an appeal from a stocking rate is not necessarily untimely merely because it was not filed when the grazing permit was issued.

Gilbert Keester v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 20 IBLA 277 (Sept. 24, 1991)

## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Timely Filing--Continued

Pursuant to 43 CFR 3185.1 and 43 CFR 3165.3, where a party to a unit agreement files a request for technical and procedural review by a State Director of BLM, the request is properly dismissed as untimely pursuant to 43 CFR 3165.3(b) when it is filed more than 20 business days after the date the decision of the authorized officer was received or deemed to be received by the aggrieved party.

Global Natural Resources Corp., 121 IBLA 286 (Nov. 22, 1991)

### EVIDENCE

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a higher price. Once a prima facie case has been made, the burden of going forward shifts to the claimant, who must overcome the Government's case by a preponderance of the evidence. If a claimant presents evidence that a deposit has some unique property giving it a distinct and special value of sufficient weight to overcome the Government's showing, the resulting finding will be that the mineral material is not common variety and is therefore locatable.

Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so

## RULES OF PRACTICE--Continued

### EVIDENCE--Continued

by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill" deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

### GOVERNMENT CONTESTS:

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Ralph Page, 119 IELA 12 (Mar. 18, 1991)

## RULES OF PRACTICE--Continued

### GOVERNMENT CONTESTS--Continued

On appeal, the Forest Service urges a finding that too much weight was given to claimant's evidence. It does not, however, allege that there is any contrary evidence or tender any proof that it possesses evidence which would lead to a different result if another hearing were held. If an appellant seeks another hearing it must tender sufficient evidence indicating a discovery (or lack thereof) to convince this Board that such a further hearing is warranted. Without such offer, no hearing will be ordered.

In a contest not involving a patent application, when the Government raises an issue not set out in the complaint during the hearing or in its posthearing brief, an Administrative Law Judge's refusal to address the new issue will be affirmed on appeal to this Board. This general rule does not apply, however, if a patent application is pending. When a claimant has filed an application for patent to the claims subject to the contest and the newly raised issue is not barred by the doctrine of res judicata, that issue should be addressed if an adverse ruling on the issue would result in denial of the pending patent. The Department cannot legally grant a mineral patent when the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been met.

Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. As the title owner, the United States may regulate mining activities in national forests in order to protect the surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claim is irrelevant.

United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

## RULES OF PRACTICE--Continued

### HEARINGS

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Similarly, the Government has the responsibility of going forward to establish a prima facie case when a contest involves the issue of discovery. It may do so by presenting evidence that the mineralization fails to satisfy the prudent man test in one or more respects. Once the Government case is presented the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant elects to not present or fails to present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is thus null and void.

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a minor distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to a "run of the mill"

## RULES OF PRACTICE--Continued

### HEARINGS--Continued

deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

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United States of America v. Multiple Use, Inc., 120 IBLA 63 (July 15, 1991)

### PROTESTS

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it

RULES OF PRACTICE--Continued

PROTESTS--Continued

decides to reject them, should explain its reasons for doing so.

Joyce & Tony Padilla, 119 IBLA 33 (Mar. 25, 1991)

A supplemental plat of survey, approved in 1968, may not be challenged years later by a protest filed under 43 CFR 4.450-2 because that section of the regulations identifies a protest as any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau. The previous approval and filing of a plat of survey is not an action proposed to be taken.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

The State of Alaska has an interest in assuring that its citizens will have access to lands and resources owned by it, its political subdivisions, or the United States, and to public bodies of water regularly used for transportation purposes. A protest presenting colorable allegations that the State's interest will be adversely affected by a decision is sufficient to give standing to appeal dismissal of a protest. The State has a right to appeal the dismissal of a protest for procedural reasons.

BLM has authority to review the legal sufficiency of a protest filed by the State of Alaska under subsec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), and to dismiss a protest which it finds to be insufficient. Disagreement with facts asserted in a protest is not a proper basis for dismissal.

State of Alaska (Harvey Pootoogooluk), 121 IBLA 363 (Dec. 19, 1991)

## RULES OF PRACTICE--Continued

### SUPERVISORY AUTHORITY OF THE SECRETARY

In exercising the authority of the Secretary of the Interior to review decisions issued by officials of the BIA, the Board of Indian Appeals is not limited by the standards of review set forth in the APA, 5 U.S.C. § 706 (1988), for review of agency decisionmaking by the Federal courts.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs,  
21 IBIA 24 (Oct. 22, 1991)

### SECRETARY OF THE INTERIOR

(See also Administrative Authority)

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

The Moran Corp., 120 IBLA 245 (Aug. 9, 1991)

### SEGREGATION

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

SEGREGATION--Continued

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

A mining claim located at a time when the land is segregated from appropriation under the mining law by a small tract classification is properly declared null and void ab initio.

Patsy A. Brings, 119 IBLA 319 (June 18, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

#### SPECIAL USE PERMITS

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

Pacific Crest Outward Bound School, 117 IBLA 309  
(Jan. 23, 1991)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to cultural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

A finding of no significant environmental impact associated with a special recreation use permit for an off-road vehicle tour may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

Owen Severance et al., 118 IBLA 381 (Mar. 15, 1991)

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

American Motorcycle Ass'n, District 37, 119 IBLA 196  
(May 7, 1991)

SPECIAL USE PERMITS--Continued

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

The issuance of a special recreation use permit is discretionary, and, where necessary to avoid adverse impacts on wildlife, BLM may restrict use on the Rio Grande River during the period it is revising a management plan for the river, by issuing a limited number of special recreation permits. Where appellant does not show that the authorized officer's decision was unreasonable, BLM's decision will be affirmed.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 121 IBLA 169 (Oct. 31, 1991)

#### STATE SELECTIONS

(See also School Lands, Swamplands)

BLM properly declared a group of unpatented mining claims null and void ab initio because official land status records of the Department noted that the land was, when the claims were located, encompassed by a State selection, valid on its face, which thereby segregated the land from mineral entry even though the selection was void or voidable, since the land was within a national forest.

Hyak Mining Co., 119 IBLA 1 (Mar. 15, 1991)

#### STATUTORY CONSTRUCTION

##### ADMINISTRATIVE CONSTRUCTION

In interpreting a statute that attempts to address two conflicting Federal policies, the BIA must be cognizant of the inherent tension within the statute.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (July 17, 1991)

##### INDIANS

Where Congress, in amending an existing statutory provision, indicates an intent to clarify that provision, the amendment and its legislative history may be used in construing the original enactment.

Estate of Peter Alvin Ward, 19 IBIA 196 (Feb. 5, 1991)  
98 I.D. 14

## STATUTORY CONSTRUCTION--Continued

### INDIANS--Continued

Doubtful or ambiguous expressions in statutes enacted for the benefit of Indians must be interpreted in favor of the Indians.

Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs & Mayr Brothers Logging Co., Inc., et al., Portland Area Director, Bureau of Indian Affairs,  
20 IBIA 143 (July 17, 1991)

### LEGISLATIVE HISTORY

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Estate of Peter Alvin Ward, 19 IBIA 196 (Feb. 5, 1991)  
98 I.D. 14

## SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

### GENERALLY

The "physically related site" criteria, which were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), may be applied retroactively to determine whether operations in 1981 are eligible for the 2-acre exemption.

Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA under the "2-acre exemption" where that operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

GENERALLY--Continued

under "common control." The second criterion is met when OSM makes an un rebutted prima facie showing that both operations drain into the same watershed. The third criterion is met when OSM presents evidence indicating that one person engaged in mining at both operations and that he was in control of both operations. The operator is properly found to be in control of an operation where he flagged it for mining, created a highwall, and exposed and augered coal, notwithstanding that another person also engaged in mining activity on that operation for a portion of the time the operation was underway.

Where the facts demonstrate that one person retained control over an operation, he is properly cited for failure to reclaim the site. Even assuming arguendo that he and another person shared control of the operation for a portion of the time the site was being mined, he is still properly cited, as, in such circumstances, both parties are jointly and severally liable for compliance with any applicable performance standards.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

ADMINISTRATIVE PROCEDURE

Generally

When an applicant for review of NOV's and a CO fails to appear at a scheduled review hearing, and does not justify such failure, the ALJ properly decides the case based upon the record completed at the hearing, despite the absence of evidence in support of the applicant's case.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 111 (Apr. 18, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

If a citizen files a complaint with OSM alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of SMCRA, OSM has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

Pursuant to SMCRA, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

Under SMCRA, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)) of SMCRA to take any

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

"appropriate action" short of adjudication of property title disputes.

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 201(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

Burden of Proof

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the civil penalty. OSM must establish the basis for determination of the appropriate civil penalty charged an operator for allowing gullies to develop in an access road, including the basis for its implicit conclusion

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

that existence of gullies is likely to endanger either use of the roadway or the surrounding land. Where the sum of the evidence reveals only that the gullies temporarily affected access along a small portion of the access road, and where there is no evidence that the gullies threatened adjacent land, OSM's conclusion and its accompanying assignment of 11 points for the seriousness of the violation are properly set aside.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

In a proceeding involving an application for review of a NOV, OSM has the burden of going forward to make a prima facie showing that the person named in the notice is engaged in a surface coal mining operation and violated SMCRA, the regulations, or a permit condition. The ultimate burden of persuasion rests with the applicant for review, and if OSM's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed.

Where OSM presents evidence that an applicant for review was engaged in surface coal mining operations under a permit; that it had disturbed "adjacent land"; and that the disturbance was incidental to its coal extraction activities on the permit, a prima facie case in support of a violation of 30 CFR 773.17(a) is established. However, where the applicant shows by a preponderance of the evidence that its activity outside the permit boundaries does not constitute surface coal mining operations, the violation is properly vacated.

Rith Energy, Inc. v. Office of Surface Mining Reclamation and Enforcement, 119 IBLA 83 (Apr. 9, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

APPLICABILITY

Generally

The "physically related site" criteria, which were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), may be applied retroactively to determine whether operations in 1981 are eligible for the 2-acre exemption.

Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA under the "2-acre exemption" where that operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." The second criterion is met when OSM makes an un rebutted prima facie showing that both operations drain into the same watershed. The third criterion is met when OSM presents evidence indicating that one person engaged in mining at both operations and that he was in control of both operations. The operator is properly found to be in control of an operation where he flagged it for mining, created a highwall, and exposed and augered coal, notwithstanding that another person also engaged in mining activity on that operation for a portion of the time the operation was underway.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

APPROXIMATE ORIGINAL CONTOUR

Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

BACKFILLING AND GRADING REQUIREMENTS

Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

BONDS

Generally

A performance bond issued in 1981, during the interim program when a bond was required by the State but was not required by SMCRA, and evidently used again as the bond required by the State's surface mining act and by SMCRA for granting of permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

BONDS--Continued

Generally--Continued

remains enforceable by OSM despite repeal of the State's surface mining act.

Exchange Mutual Insurance Co., 119 IBLA 296 (June 11, 1991)

Release of

Where OSM determines the percentage of vegetative ground cover within an area covered by a surface mining permit being reclaimed for use as pasture to be less than 90 percent, in violation of 30 CFR 942.816(f)(1), and where the permittee fails to challenge this determination or the methodology used to make it, OSM's decision disapproving the permittee's application for a Phase II bond release will be affirmed.

Newtex Management Corp., 117 IBLA 380 (Feb. 13, 1991)

CESSATION ORDERS

The doctrines of collateral estoppel and res judicata will not preclude OSM from taking enforcement action in a primacy state where similar state regulatory authority enforcement actions have been resolved through settlement, since the statutory scheme of SMCRA evidences a countervailing statutory policy against the application of those doctrines in such situations. Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violations are not fully litigated before the state agency, but are resolved through a

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CESSATION ORDERS--Continued

settlement agreement, and there is no privity between OSM and the state.

Annaco, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 158 (Apr. 30, 1991)

Generally

When, on the basis of a Federal inspection, the permittee is found to be in violation of any requirement of SMCRA, and the violation does not create an imminent danger to the health and safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the inspector shall issue a notice to the permittee or its agent fixing a reasonable time for abatement. If, when the period for abatement expires, the violation remains unabated, cessation of surface coal mining and reclamation operations shall be ordered.

Unless and until the permittee gives proper notice of a change or designation of a party or parties authorized to receive a notice of violation or cessation order, delivery of a notice of violation or cessation order to one of the parties named as owner or agent of the applicant in the application for a surface mining permit will constitute service of the notice of violation or cessation order.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CESSATION ORDERS--Continued

Generally--Continued

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own cessation order in situations where a similar cessation order was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

CITIZEN COMPLAINTS

Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

If a citizen files a complaint with OSM alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of SMCRA, OSM has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

Pursuant to SMCRA, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

Under SMCRA, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 1257(b)(9) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)) of SMCRA to take any "appropriate action" short of adjudication of property title disputes.

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 102(b) (30 U.S.C. 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

CIVIL PENALTIES

Generally

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ENFORCEMENT PROCEDURES

Generally

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden of proving the existence of the rights giving rise to such entitlement.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

Pursuant to SMCRA, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. If, after Federal inspection, OSM determines that the activity is in violation of any requirement of the Act, OSM may issue a notice of violation to the operator or cessation order, fixing a reasonable time for abatement.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

EVIDENCE

Generally

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

EVIDENCE--Continued

Generally--Continued

civil penalty. OSM must establish the basis for determination of the appropriate civil penalty charged an operator for allowing gullies to develop in an access road, including the basis for its implicit conclusion that existence of gullies is likely to endanger either use of the roadway or the surrounding land. Where the sum of the evidence reveals only that the gullies temporarily affected access along a small portion of the access road, and where there is no evidence that the gullies threatened adjacent land, OSM's conclusion and its accompanying assignment of 11 points for the seriousness of the violation are properly set aside.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

In a proceeding involving an application for review of a NOV, OSM has the burden of going forward to make a prima facie showing that the person named in the notice is engaged in a surface coal mining operation and violated SMCRA, the regulations, or a permit condition. [D The ultimate burden of persuasion rests with the applicant for review, and if OSM's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed.

Where OSM presents evidence that an applicant for review was engaged in surface coal mining operations under a permit; that it had disturbed "adjacent land"; and that the disturbance was incidental to its coal extraction activities on the permit, a prima facie case in support of a violation of 30 CFR 773.17(a) is established. However, where the applicant shows by a preponderance of the evidence that its activity outside

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

EVIDENCE--Continued

Generally--Continued

the permit boundaries does not constitute surface coal mining operations, the violation is properly vacated.

Rith Energy, Inc. v. Office of Surface Mining Reclamation and Enforcement, 119 IBLA 83 (Apr. 9, 1991)

If a question arises concerning who is responsible for compliance at a surface coal mining operation, it is proper for the OSM inspector issuing a NOV to cite all parties who may be responsible. When a cited party challenges such a notice on the basis that it is not a responsible party, OSM bears the burden of going forward to establish a prima facie case that such party is responsible. The challenging party, however, bears the burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violations.

W. P. Corp. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 130 (Apr. 22, 1991)

EXEMPTIONS

2-Acre

The "physically related site" criteria, which were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), may be applied retroactively to determine whether operations in 1981 are eligible for the 2-acre exemption.

Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA under the "2-acre exemption" where that operation, together with any "related" operation, has or will have an affected area of 12 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related"

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

EXEMPTIONS--Continued

2-Acre--Continued

if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." The second criterion is met when OSM makes an un rebutted prima facie showing that both operations drain into the same watershed. The third criterion is met when OSM presents evidence indicating that one person engaged in mining at both operations and that he was in control of both operations. The operator is properly found to be in control of an operation where he flagged it for mining, created a highwall, and exposed and augered coal, notwithstanding that another person also engaged in mining activity on that operation for a portion of the time the operation was underway.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

FEDERAL PROGRAM

Permits

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

FEDERAL PROGRAM--Continued

Permits--Continued

the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

HEARINGS

Procedure

When an applicant for review of NOVs and a CO fails to appear at a scheduled review hearing, and does not justify such failure, the ALJ properly decides the case based upon the record completed at the hearing, despite the absence of evidence in support of the applicant's case.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 111 (Apr. 18, 1991)

IMPOUNDMENTS

Generally

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

IMPOUNDMENTS--Continued

Generally--Continued

impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

INSPECTIONS

Generally

In response to a citizen's complaint charging that an area disturbed by surface coal mining operations has not been restored to its approximate original contour, OSM properly declines to undertake a further inspection of the minesite and enforcement action where it determines that the land has been so restored, and where the appellant presents no evidence to the contrary.

Peter J. Rosati, 119 IBLA 219 (May 14, 1991)

10-day Notice to State

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

proper for OSM to order a Federal inspection. If, after Federal inspection, OSM determines that the activity is in violation of any requirement of the Act, OSM may issue a notice of violation to the operator or cessation order, fixing a reasonable time for abatement.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

NOTICES OF VIOLATION

Generally

When, on the basis of a Federal inspection, the permittee is found to be in violation of any requirement of SMCRA, and the violation does not create an imminent danger to the health and safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the inspector shall issue a notice to the permittee or its agent fixing a reasonable time for abatement. If, when the period for abatement expires, the violation remains unabated, cessation of surface coal mining and reclamation operations shall be ordered.

Unless and until the permittee gives proper notice of a change or designation of a party or parties authorized to receive a notice of violation or cessation order, delivery of a notice of violation or cessation order to one of the parties named as owner or agent of the applicant in the application for a surface mining permit will constitute service of the notice of violation or cessation order.

Roy E. Mehaffey v. Office of Surface Mining Reclamation & Enforcement, 117 IBLA 350 (Jan. 31, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the civil penalty. OSM must establish the basis for determination of the appropriate civil penalty charged an operator for allowing gullies to develop in an access road, including the basis for its implicit conclusion that existence of gullies is likely to endanger either use of the roadway or the surrounding land. Where the sum of the evidence reveals only that the gullies temporarily affected access along a small portion of the access road, and where there is no evidence that the gullies threatened adjacent land, OSM's conclusion and its accompanying assignment of 11 points for the seriousness of the violation are properly set aside.

The Board of Land Appeals may direct OSM to waive a civil penalty where the total of penalty points properly assessed was 30 or less and no cessation order was issued. The Board will so direct where only a single, isolated violation is involved; where there is an absence of proof of any substantial harm from the violation, either on- or off-site; and where the record shows that the operator abated the violation as soon as practical.

Intersouth Mineral Co., Inc. v. Office of Surface Mining Reclamation & Enforcement (Appellant), 118 IBLA 14 (Feb. 14, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden of proving the existence of the rights giving rise to such entitlement.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

Where the facts demonstrate that one person retained control over an operation, he is properly cited for failure to reclaim the site. Even assuming arguendo that he and another person shared control of the operation for a portion of the time the site was being mined, he is still properly cited, as, in such circumstances, both parties are jointly and severally liable for compliance with any applicable performance standards.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

NOTICES OF VIOLATION--Continued

Permittees

If a question arises concerning who is responsible for compliance at a surface coal mining operation, it is proper for the OSM inspector issuing a NOV to cite all parties who may be responsible. When a cited party challenges such a notice on the basis that it is not a responsible party, OSM bears the burden of going forward to establish a prima facie case that such party is responsible. The challenging party, however, bears the burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violations.

W. P. Corp. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 130 (Apr. 22, 1991)

Under sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1988), a permittee of a minesite was properly cited for a violation of the Act notwithstanding the fact that the surface mining or related activity was performed by a third party.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991)      98 I.D. 231

PERFORMANCE BOND OR DEPOSIT

Generally

A performance bond issued in 1981, during the interim program when a bond was required by the State but was not required by SMCRA, and evidently used again as the bond required by the State's surface mining act and by SMCRA for granting of permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PERFORMANCE BOND OR DEPOSIT--Continued

Generally--Continued

remains enforceable by OSM despite repeal of the State's surface mining act.

Exchange Mutual Insurance Co., 119 IBLA 296 (June 11, 1991)

Release

Where OSM determines the percentage of vegetative ground cover within an area covered by a surface mining permit being reclaimed for use as pasture to be less than 90 percent, in violation of 30 CFR 942.816(f)(1), and where the permittee fails to challenge this determination or the methodology used to make it, OSM's decision disapproving the permittee's application for a Phase II bond release will be affirmed.

Newtex Management Corp., 117 IBLA 380 (Feb. 13, 1991)

PERMITS

Generally

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PERMITS--Continued

Generally--Continued

of proving the existence of the rights giving rise to such entitlement.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

"Permit." A permit is a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority. Under SMCRA, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated area under the conditions specified in the permit, without which permit such mining would not be allowable.

Under the Surface Mining Control and Reclamation Act of 1977, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) 30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PERMITS--Continued

Generally--Continued

30 U.S.C. § 1257(b)(9) (1988)) of the Surface Mining Control and Reclamation Act of 1977 to take any "appropriate action" short of adjudication of property title disputes.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

Ownership or Control

Where the facts demonstrate that one person retained control over an operation, he is properly cited for failure to reclaim the site. Even assuming arguendo that he and another person shared control of the operation for a portion of the time the site was being mined, he is still properly cited, as, in such circumstances, both parties are jointly and severally liable for compliance with any applicable performance standards.

W. D. Martin (dba Martin Coal) v. Office of Surface Mining Reclamation & Enforcement, 120 IBLA 279 (Aug. 30, 1991)

Revisions

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PERMITS--Continued

Revisions--Continued

impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

POSTMINING LAND USE

Generally

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PROHIBITION OF MINING OPERATIONS

Generally

"Occupied dwelling." The definition of "occupied dwelling" set forth at 30 CFR 761.5 does not require that the dwelling be used solely for human habitation. So long as the "building is currently being used on a regular or temporary basis for human habitation," the structure falls within the scope of the regulatory definition. A building is properly determined to be an "occupied dwelling" notwithstanding the fact that an occupant also operates a full-time antique business in the building.

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the burden of proving the existence of the rights giving rise to such entitlement.

"Surface coal mining operation." Notwithstanding a State regulatory authority's determination that a portal building and adjacent parking lot did not fall within the State definition of a surface coal mining operation, the building and parking lot will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of SMCRA, 30 U.S.C. § 1272(e) (1988), when the evidence establishes that these surface facilities exist to support and are "incident to" underground mining.

Under sec. 522(e)(4) and (e)(5) of SMCRA, 30 U.S.C. § 1272(e)(4) and (e)(5) (1988), no surface impacts incident to underground mining may be created within 100 feet of a road and 300 feet of an occupied dwelling unless the mine operator had a valid existing right on Aug. 3, 1977. To have valid existing rights on Aug. 3,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PROHIBITION OF MINING OPERATIONS--Continued

Generally--Continued

1977, under the regulatory scheme currently applicable to adjudications arising under the interim program, the operator conducting underground mining must have held property rights which were created by a legally binding document authorizing the operator to create those surface impacts incident to an underground mining operation being contemplated, and must have made a good faith effort to obtain all permits required to conduct such operations prior to Aug. 3, 1977, or show that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

When approval of an erosion and sedimentation control plan was the only "permit" a coal company was required to obtain before creating the surface impacts located within the 100- and 300-foot buffer zones, and it is shown that application was made prior to Aug. 3, 1977, and the plan was approved Aug. 12, 1977, a good faith effort to obtain all permits required to conduct surface impacts incident to mining within the 100- and 300-foot buffer zones has been demonstrated for purposes of establishing valid existing rights on Aug. 3, 1977.

A coal mine operator failed to show that a valid existing right to create surface impacts on the lands in question existed on Aug. 3, 1977. The right to mine coal had been severed from the surface right prior to Aug. 3, 1977, and the operator failed to demonstrate that: (1) a merger of title prior to that date; (2) all of the coal to be mined in conjunction with the surface impacts was within the lands held by the grantor at the time of severance; (3) the conveyance document at the time of severance included the right to create the surface impacts for the purpose of extracting coal from lands other than that conveyed by the grantor; (4) the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PROHIBITION OF MINING OPERATIONS--Continued

Generally--Continued

existence of a lease or other express agreement granting such right; or (5) the existence of any other contractual relationship between the coal owner and the surface owner binding the surface owner to dedicate the land to the coal mining operation.

A disparity in the consideration term of a surface lease executed after Aug. 3, 1977, and a letter preceding Aug. 3, 1977, precluded a finding under Pennsylvania law that a legally enforceable lease was in existence on Aug. 3, 1977, affording the valid existing rights claimant the right to create the surface impacts within the 100- and 300-foot buffer zones.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

REVEGETATION

Generally

Where OSM determines the percentage of vegetative ground cover within an area covered by a surface mining permit being reclaimed for use as pasture to be less than 90 percent, in violation of 30 CFR 942.816(f)(1), and where the permittee fails to challenge this determination or the methodology used to make it, OSM's decision disapproving the permittee's application for a Phase II bond release will be affirmed.

Newtex Management Corp., 117 IBLA 380 (Feb. 13, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

SPOIL AND MINE WASTES

Generally

"Excess spoil." Spoil needed for returning disturbed land to its approximate original contour is not "excess spoil."

OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not conform to the AOC of the area prior to the surface mining and reclamation operations.

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

STATE PROGRAM

Generally

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

Annaco, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 158 (Apr. 30, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

Generally--Continued

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

10-day Notice to State

If a citizen files a complaint with OSM alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of SMCRA, OSM has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

Under SMCRA, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)) of SMCRA to take any "appropriate action" short of adjudication of property title disputes.

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 102(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. If, after Federal inspection, OSM determines that the activity is in violation of any requirement of the Act, OSM may

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

issue a notice of violation to the operator or cessation order, fixing a reasonable time for abatement.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

STATE REGULATION

Generally

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

The doctrines of collateral estoppel and res judicata will not preclude OSM from taking enforcement action in a primacy state where similar state regulatory authority enforcement actions have been resolved through settlement, since the statutory scheme of SMCRA evidences a countervailing statutory policy against the application of those doctrines in such situations. Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violations are not fully litigated before the state agency, but are resolved through a settlement agreement, and there is no privity between OSM and the state.

Annaco, Inc. v. Office of Surface Mining Reclamation & Enforcement, 119 IBLA 158 (Apr. 30, 1991)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

STATE REGULATION--Continued

Generally--Continued

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own cessation order in situations where a similar cessation order was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation & Enforcement, 121 IBLA 142 (Oct. 28, 1991)

VALID EXISTING RIGHTS

Generally

Under sec. 522(e)(4) and (e)(5) of SMCRA, 30 U.S.C. § 1272(e)(4) and (e)(5) (1988), no surface impacts incident to underground mining may be created within 100 feet of a road and 300 feet of an occupied dwelling unless the mine operator had a valid existing right on Aug. 3, 1977. To have valid existing rights on Aug. 3, 1977, under the regulatory scheme currently applicable to adjudications arising under the interim program, the operator conducting underground mining must have held property rights which were created by a legally binding document authorizing the operator to create those surface impacts incident to an underground mining operation being contemplated, and must have made a good faith

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

VALID EXISTING RIGHTS--Continued

Generally--Continued

effort to obtain all permits required to conduct such operations prior to Aug. 3, 1977, or show that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

When approval of an erosion and sedimentation control plan was the only "permit" a coal company was required to obtain before creating the surface impacts located within the 100- and 300-foot buffer zones, and it is shown that application was made prior to Aug. 3, 1977, and the plan was approved Aug. 12, 1977, a good faith effort to obtain all permits required to conduct surface impacts incident to mining within the 100- and 300-foot buffer zones has been demonstrated for purposes of establishing valid existing rights on Aug. 3, 1977.

A coal mine operator failed to show that a valid existing right to create surface impacts on the lands in question existed on Aug. 3, 1977. The right to mine coal had been severed from the surface right prior to Aug. 3, 1977, and the operator failed to demonstrate that: (1) a merger of title prior to that date; (2) all of the coal to be mined in conjunction with the surface impacts was within the lands held by the grantor at the time of severance; (3) the conveyance document at the time of severance included the right to create the surface impacts for the purpose of extracting coal from lands other than that conveyed by the grantor; (4) the existence of a lease or other express agreement granting such right; or (5) the existence of any other contractual relationship between the coal owner and the surface owner binding the surface owner to dedicate the land to the coal mining operation.

A disparity in the consideration term of a surface lease executed after Aug. 3, 1977, and a letter preceding Aug. 3, 1977, precluded a finding under Pennsylvania law that a legally enforceable lease was in existence on Aug. 3, 1977, affording the valid existing rights

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

VALID EXISTING RIGHTS--Continued

Generally--Continued

claimant the right to create the surface impacts within the 100- and 300-foot buffer zones.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

WORDS AND PHRASES

"Occupied dwelling." The definition of "occupied dwelling" set forth at 30 CFR 761.5 does not require that the dwelling be used solely for human habitation. So long as the "building is currently being used on a regular or temporary basis for human habitation," the structure falls within the scope of the regulatory definition. A building is properly determined to be an "occupied dwelling" notwithstanding the fact that an occupant also operates a full-time antique business in the building.

"Surface coal mining operation." Notwithstanding a State regulatory authority's determination that a portal building and adjacent parking lot did not fall within the State definition of a surface coal mining operation, the building and parking lot will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of SMCRA, 30 U.S.C. § 1272(e) (1988), when the evidence establishes that these surface facilities exist to support and are "incident to" underground mining.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, June S. Stout (Intervenor), 118 IBLA 129 (Mar. 6, 1991) 98 I.D. 70

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WORDS AND PHRASES--Continued

"Permit." A permit is a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority. Under SMCRA, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated area under the conditions specified in the permit, without which permit such mining would not be allowable.

Paul F. Kuhn, 120 IBLA 1 (July 3, 1991) 98 I.D. 231

SURVEYS OF PUBLIC LANDS

(See also Boundaries, Public Lands)

GENERALLY

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

## SURVEYS OF PUBLIC LANDS--Continued

### GENERALLY--Continued

Under the EAJA, 5 U.S.C. § 504 (1988), and 43 CFR 4.603, an adversary adjudication is one required by statute to be determined on the record after an opportunity for an agency hearing in accordance with 5 U.S.C. § 554 (1988). Where the Board of Land Appeals orders a hearing in an omitted lands survey case, in accordance with 43 CFR 4.415, such a proceeding is not an adversary adjudication within the meaning of the EAJA and 43 CFR 4.603.

Herbert J. Hansen, 119 IBLA 29 (Mar. 21, 1991)

In apportioning accreted lands between two adjoining riparian sections, BLM properly uses the perpendicular survey method where it is not feasible to use the proportionate shoreline survey method because no zero accretion point or end point of a perpendicular line drawn to the new bank of the river created by accretion may be used to allocate proportionate parts of that bank to the sections.

In utilizing the perpendicular survey method to apportion accreted lands between two adjoining riparian sections, BLM must select a perpendicular line drawn to the new bank of the river created by accretion which equitably apportions that bank between the sections, consistent, whenever practicable, with awarding to each section the land in front of it.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor),  
9 OHA 17 (Mar. 26, 1991) 98 I.D. 164

## SURVEYS OF PUBLIC LANDS--Continued

### GENERALLY--Continued

A supplemental plat of survey, approved in 1968, may not be challenged years later by a protest filed under 43 CFR 4.450-2 because that section of the regulations identifies a protest as any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau. The previous approval and filing of a plat of survey is not an action proposed to be taken.

MM Holdings, Inc., 121 IBLA 26 (Oct. 7, 1991)

### OMITTED LANDS

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document purporting on its fact to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey showing the land as lakeshore property, such a document purports on its fact to convey the claimed land.

James R. Biersack, 117 IBLA 339 (Jan. 29, 1991)

## SURVEYS OF PUBLIC LANDS--Continued

### OMITTED LANDS--Continued

The Secretary of the Interior is authorized and obligated to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. An island, whether located in navigable or nonnavigable waters, that is omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

In determining whether a land mass was an island omitted from an original public land survey, the inquiry focuses on the existence and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

Exxon Corp., et al. v. Bureau of Land Management,  
118 IBLA 38 (Feb. 21, 1991)

### TAYLOR GRAZING ACT

(See also Grazing Leases, Grazing Permits & Licenses)

A decision by BLM to grant a sheep grazing application subject to restrictions in order to facilitate multiple-use management objectives by keeping a portion of an allotment off limits to domestic sheep so that it might be available for the introduction of bighorn sheep, will not be disturbed absent substantial evidence showing that the decision is improper.

Joe Saval Co. v. Bureau of Land Management, State of Nevada, Department of Wildlife (Intervenor), 119 IBLA 202 (May 7, 1991)

#### TIMBER SALES AND DISPOSALS

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

Oregon Natural Resources Council, 120 IBLA 261 (Aug. 21, 1991)

The sale of timber by BLM does not involve a "taking" of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988). This Act was not intended to include habitat modification or degradation among its prohibitions.

The O&C Act makes clear that the primary use of O&C lands is for timber production to be managed in conformity with the principle of sustained yield. BLM did not err in construing the O&C Act as establishing timber production as the dominant use, notwithstanding the provisions of FLPMA calling for multiple use.

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to disclose any impact to the murrelet from the salvage sale of dead and blown-down timber.

In re Bar First Go Round Salvage Sale et al., 121 IBLA 347 (Dec. 17, 1991)

## TOWNSITES

Because the Alaska Townsite Trustee has no authority to withdraw land from settlement under the townsite laws in favor of a joint venture composed of two Native village corporations, such an attempted withdrawal does not preclude the timely initiation and occupancy of townsite claims by other individuals.

Where a townsite claimant stakes a claim and moves a house onto the claim and occupies it prior to revocation of the townsite laws by the Federal Land Policy and Management Act of 1976, and the record shows the claimant's expressed intent to occupy the entire claim, he has established an entitlement to that claim.

Marlin L. Virg-in, City of St. Mary's, 117 IBLA 285  
(Jan. 16, 1991)

Mining claims located on land described by a townsite patent are properly declared null and void where the claimants, after being offered the opportunity to present evidence to show that their mining claims embrace lands within mining claims that were valid on the date of the townsite patent, fail to present proof that there was a valid discovery of a valuable mineral deposit on any such claims on the date of the townsite patent.

Norman R. Blake, Mildred L. Blake, 119 IBLA 141  
(Apr. 25, 1991)

## TRESPASS

### GENERALLY

A decision determining back rental for a period of unauthorized use of a site used as an oil well servicing facility will be set aside and remanded where the record fails to establish how BLM arrived at the determination of past annual fair market rental value.

Sierra Production Service, 118 IBLA 259 (Mar. 11, 1991)

Where the record does not show that a trespasser lacked good faith, or acted unreasonably or irresponsibly, but demonstrates instead that he removed materials from a gravel pit on the basis of erroneous advice from a BLM official, a BLM assessment of trespass damages based on willfulness will be set aside and remanded for recalculation on the basis of innocent trespass.

Western States Contracting, Inc., 119 IBLA 355 (June 18, 1991)

A BLM decision notifying the occupant of public land of the initiation of trespass proceedings and requiring the removal of unauthorized property, based on the fact that the holder of a life estate occupancy lease for the land in question had relinquished the lease, will be set aside where the record shows that the land was the subject of a mining claim properly recorded with BLM in 1982 and questions exist regarding present ownership of the claim and whether occupancy of the claim is reasonably incident to mining.

Mr. & Mrs. Michael Bosch, 119 IBLA 370 (June 26, 1991)

TRESPASS--Continued

MEASURE OF DAMAGES

The proper measure of damages for intentional conversion of decorative building stone taken from Federal lands in the State of Colorado is the value of the stone without deduction for extraction costs. The measure of damages to be used is derived from state law, in the absence of Federal law authorizing imposition of a different rule.

Consistent with Colorado law, damages for intentional trespass involving stone on Federal lands require payment of full value of the stone taken without deduction for labor or expense in removing and marketing the stone.

John Aloe & Liberty Masonry, Inc., 117 IBLA 298 (Jan. 17, 1991)

If payment is required for use of the public lands, either with or without prior approval of the Department, a fair market rental value determination must be made pursuant to 43 CFR 2920.

Fair market rental value may be assessed from a flat rate fee schedule established by BLM appraisal staff.

Universal City Studios, Inc., 120 IBLA 216 (Aug. 5, 1991)

The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

Summit Quest, Inc., 120 IBLA 374 (Sept. 19, 1991)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)  
(See also Appeals)

UNIFORM REAL PROPERTY ACQUISITION POLICY

Generally

Attorney fees incurred by the owners of real property because of a condemnation proceeding brought by the United States to acquire that property are not reimbursable litigation expenses under the Act and the Department's implementing regulation where the real property concerned was transferred to the United States under an agreed-upon settlement of the condemnation proceedings.

Uniform Relocation Assistance Appeal of Mr. & Mrs.  
Drew H. Arndt, 9 OHA 15 (Mar. 21, 1991)

UNIFORM RELOCATION ASSISTANCE

Moving\_and\_Related\_Expenses

Generally

Where appellants have not established on appeal that they are entitled under the law and the Department's regulations to a greater payment for moving and related expenses than that determined to be allowable in the decision appealed from, the determination will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs.  
Lightle Samsel, 9 OHA 8 (Feb. 28, 1991)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Generally--Continued

Where appellant has not established entitlement under the law and the Department's regulations to a greater payment for moving and related expenses than that allowed by the Park Service in the decisions appealed from, the Park Service decisions will be affirmed.

Uniform Relocation Assistance Appeals of Thomas B. Wilson (President), Yachts America, Inc., 9 OHA 59 (May 3, 1991)

Replacement Housing Payment for Homeowners

Generally

Where appellants have not established on appeal that they are entitled under the law and the Department's regulations to a greater payment for replacement housing differential costs than that determined to be allowable in the decision appealed from, the determination will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Lightle Samsel, 9 OHA 8 (Feb. 28, 1991)

A claim for housing price differential payment benefits is properly denied where a comparable housing survey of the area within reasonably close proximity to the Government-acquired property shows that the claimants

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners--Continued

Generally--Continued

could have purchased comparable replacement property at a price less than was paid for the acquired property.

Uniform Relocation Assistance Appeal of Mr. & Mrs.  
Gerald C. Caugh, 9 OHA 99 (Oct. 31, 1991)

WILD FREE-ROAMING HORSES AND BURROS ACT

The Board will affirm a BLM decision to remove wild horses from a herd management area where removal is predicated on an analysis of grazing utilization, trend in range condition, actual use, and other factors, which demonstrate that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988).

Departmental regulation 43 CFR 4710.4 requires wild horse management to be undertaken with the objective of limiting the animals' distribution to herd areas, which are defined as "the geographic area identified as having been used by a herd as its habitat in 1971." 43 CFR 4700.0-5(d).

The decision to remove wild horses from an area of the public lands is properly remanded where the record fails to establish that the horses are excess, i.e., that removal of the horses is necessary to establish a thriving natural ecological balance and multiple-use relationship in that area.

Animal Protection Institute of America, 118 IBLA 20 (Feb. 15, 1991)

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

When an appellant merely urges some other course of action which may be theoretically as correct as that chosen by BLM, this Board will not overturn a BLM decision to gather excess wild horses. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. In cases involving an expert's interpretation of data, it is not enough that the party objecting to the determination demonstrates that another course of action or interpretation is available or that the proposed course of action is also supported by the evidence. The appellant must demonstrate by the preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion.

Animal Protection Institute of America et al., 118 IBLA 63 (Feb. 22, 1991)

Where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an ALJ pursuant to 43 CFR 4.470, and wild horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild horse appeal may properly be referred to the ALJ to the extent it involves factual issues for hearing and consideration together with the grazing appeal.

Animal Protection Institute of America, Roy Shurtz, 118 IBLA 345 (Mar. 13, 1991)

When BLM determines in its land-use planning process to remove wild horses from a grazing allotment and, following notice to interested parties, implements that plan, a challenge to a subsequent BLM decision allocating grazing use in the allotment, by a party who received notice of the removal, on the basis that wild

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

horses were improperly removed and should be relocated into the allotment, is untimely.

Animal Protection Institute of America, 120 IBLA 342  
(Sept. 12, 1991)

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Vickie L. Fontenot, Allen J. Fontenot, Jr., 120 IBLA 47  
(Oct. 22, 1991)

WILDERNESS ACT

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

Edmund Key, 117 IBLA 274 (Jan. 16, 1991)

In order to demonstrate error in a BLM decision to eliminate an inventory unit from further consideration as a wilderness study area pursuant to secs. 201 and 603

WILDERNESS ACT--Continued

of FLPMA, 43 U.S.C. §§ 1711 and 1782 (1988), an appellant must point out not only that BLM failed to follow proper procedures but also that the record does not support BLM's substantive conclusions and that a different determination might result from reassessment.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreement.

Neither NEPA, 42 U.S.C. § 4332 (1988), nor the Endangered Species Act, 16 U.S.C. § 1536 (1988), contains directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation is conducted pursuant to relevant provisions of FLPMA and the Wilderness Act.

The Wilderness Society et al., 119 IBLA 168 (May 1, 1991)

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a WSA is properly set aside and remanded when the evidence in the record is insufficient to support the conclusions that the structures and other personal property are, in fact, located within the WSA.

Richard W. Taylor, 119 IBLA 310 (June 11, 1991)

## WILDLIFE REFUGES AND PROJECTS

(See also Exchanges of Land, Migratory Bird Conservation Act)

### ADMINISTRATION

A Cooperative Wildlife Habitat-Farming Development Agreement negotiated under the Sikes Act, as amended by the Act of Oct. 18, 1974, 16 U.S.C. § 670g (1988), was properly cancelled when the state agency responsible for monitoring the agreement reported and inspection revealed that there had been a failure to seed, irrigate, and maintain the lands as agreed. An unsupported allegation that facts supporting the decision were not correct was insufficient to overcome the presumption that conditions reported by the public officials were as stated in the record.

George W. Anthony, 119 IBLA 332 (June 18, 1991)

## WITHDRAWALS AND RESERVATIONS

### GENERALLY

An unapproved prospecting permit application to prospect for quartz in the Ouachita National Forest in Arkansas is properly rejected where, by virtue of sec. 323 of P.L. 100-446, 102 Stat. 1774, 1827 (Sept. 27, 1988), all quartz deposits on acquired lands within the operation of Reorganization Plan No. 3 of 1946 in the forest were removed from and were made subject to disposition as common varieties under the Materials Act of 1947 (61 Stat. 681).

Lee Roy Newsom et al., 117 IBLA 386 (Feb. 13, 1991)

## WITHDRAWALS AND RESERVATIONS--Continued

### AUTHORITY TO MAKE

Where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and, further, that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by a public land order issued by the Secretary.

Richard Bargaen, 117 IBLA 239 (Jan. 3, 1991)

Because the Alaska Townsite Trustee has no authority to withdraw land from settlement under the townsite laws in favor of a joint venture composed of two Native village corporations, such an attempted withdrawal does not preclude the timely initiation and occupancy of townsite claims by other individuals.

Marlin L. Virg-in, City of St. Mary's, 117 IBLA 285 (Jan. 16, 1991)

### EFFECT OF

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby restating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

## WITHDRAWALS AND RESERVATIONS--Continued

### EFFECT OF--Continued

A mining claim located on lands previously statutorily withdrawn by the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1988), is null and void ab initio.

David R. Clark, 119 IBLA 367 (June 21, 1991)

A BLM decision declaring lode mining claims null and void ab initio because they were located on land withdrawn by the President on Oct. 12, 1910, pursuant to sec. 1 of the Act of June 25, 1910, ch. 421, 36 Stat. 847, will be reversed if it cannot be shown that the claims were located solely for nonmetalliferous minerals.

A BLM decision declaring lode mining claims null and void ab initio because they were located on land subject to a Nov. 23, 1910, GLO coal-land classification order will be set aside if BLM has not afforded the claimant an opportunity to dispute the coal-land classification.

Jonathan Z. Herod et al., 121 IBLA 339 (Dec. 13, 1991)

### RECLAMATION WITHDRAWALS

A decision declaring mining claims null and void ab initio will be set aside where BLM's decision relies upon a Secretarial order withdrawing from location all islands in the Snake River and it is unclear from the record whether the lands claimed were ever part of an island included in the withdrawal.

C. A. Braun, 119 IBLA 252 (May 16, 1991)

## WITHDRAWALS AND RESERVATIONS--Continued

### REVOCATION AND RESTORATION

Where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and, further, that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by a public land order issued by the Secretary.

Richard Bargaen, 117 IBLA 239 (Jan. 3, 1991)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a withdrawal or segregation of lands pursuant to a first-form reclamation withdrawal, thereby reinstating the terms of the withdrawal, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Shama Minerals, 119 IBLA 152 (Apr. 29, 1991)

### WORDS AND PHRASES

"Innocent purchaser for value." The phrase "innocent purchaser for value" appearing in the Transportation Act of 1940 does not refer to a subjective state of mind, but indicates instead the absence of knowledge of mineral character of land sold by a land grant railroad.

Southern Pacific Transportation Co., Eugene F. Snow, & Lloyd D. Hayes, 118 IBLA 78 (Feb. 27, 1991)

WORDS AND PHRASES--Continued

"Excess spoil." Spoil needed for returning disturbed land to its approximate original contour is not "excess spoil."

Pacific Coast Coal Co., Inc., 118 IBLA 83 (Feb. 28, 1991) 98 I.D. 38

"High-water mark." The "high-water mark" of a body of water is the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. Where a reservoir is excepted from a conveyance of the surrounding lands by reference to its high-water mark, the boundary of the lands conveyed is identifiable by observing multiple factors indicating the extent of the normal impoundment of water.

Alaska Power Administration, 119 IBLA 301 (June 11, 1991)







